(24,288)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 544.

CHARLES HARTWELL CHATER, A MINOR, BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER, ET AL., APPELLANTS,

vs.

ALFRED W. CARTER, TRUSTEE; ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED; MABEL R. HARTWELL, AND HAWAIIAN SUGAR COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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In the Circuit Court of the First Circuit.

Territory of Hawaii. January Term, 1913.

In Equity.

HARLES HARTWELL CHATER (a Minor), by his Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

vs.

LFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation, Defendants.

(Stamps $2.)

Bill in Equity.

o the Presiding Judge of the Circuit Court of the First Circuit, Territory of Hawaii, Sitting in Chambers:

Charles Hartwell Chater (a minor), a resident of Brookline, in he County of Norfolk and Commonwealth of Massachusetts, by his ext friend and guardian, Charles H. Chater, a resident of said rookline, and Charles H. Chater, in his own right and as such uardian and as Administrator of the Estate of Charlotte Lee Hartell, late of Natick, in the County of Middlesex and Commonwealth Massachusetts, bring this bill of complaint against Alfred W. arter, of the City and County of Honolulu, Territory of Hawaii, as Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, late of said Honolulu, deceased; Mabel R. Hartwell, of said Natick; and the Hawaiian Sugar ompany, a corporation duly organized and existing under the laws the Territory of Hawaii, and thereupon complaint and show as llows:

I.

That Charlotte Lee Hartwell Chater aforesaid died in said Natick, the County of Middlesex and Commonwealth of Massachusetts, on he 3rd day of September, A. D. 1909, intestate, leaving a husband, he complainant, said Charles H. Chater; and one child, namely, the mplainant, Charles Hartwell Chater, who was born on or about said d day of September, A. D. 1909.

That thereafterwards, by a decree of the probate court of the said ounty of Middlesex, Commonwealth of Massachusetts, duly made id entered on the 15th day of November, 1909, on proceedings duly ad, and the said decree being duly made and entered on the 15th

day of November, 1909, the complainant, Charles H. Chater, was appointed administrator of the estate of said Charlotte Lee Hartwell Chater, deceased, the letters of administration were duly issued by said court to said Charles H. Chater, and the said Charles H. Chater duly qualified as such administrator and is the duly qualified and acting administrator of the estate of said Charlotte Lee Hartwell Chater.

That by a decree of said probate court, upon proceedings duly had, said decree being duly made and entered on the 7th day of December, A. D. 1909, the said Charles H. Chater was appointed guardian of the person and estate of said minor, Charles Hartwell Chater, and thereafter duly qualified as such, and letters of guardianship were issued to the said Charles H. Chater, which letters have not been revoked and he is now the duly qualified and acting guardian of said Charles H. Chater.

That Alfred S. Hartwell died at said Honolulu on the 30th
3 day of August, 1912, leaving a will, in which he appointed the defendant, Alfred W. Carter, and Charles A. Hartwell, of said Natick, executors, which will was duly admitted to probate in this court on the 15th day of October, 1912, and the said Alfred W. Carter duly qualified as such executor and is the duly qualified and acting executor of the will of said Alfred S. Hartwell.

That the Hawaiian Sugar Company is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the Territory of Hawaii, and having a usual place of business at said Honolulu.

II.

That the said Alfred S. Hartwell, who was the father of said Charlotte Lee Hartwell Chater and of said Mabel R. Hartwell, and the father-in-law of said Alfred W. Carter, being on the 27th day of March, 1909, the owner of a large number of shares of said Hawaiian Sugar Company, caused certain of said shares to be transferred to the name of Alfred W. Carter as trustee, and particularly 585 of such shares to be transferred to said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater, and caused a certificate to be issued to said trustee for said 585 shares, reciting in said certificate that the said Alfred W. Carter was the holder of said shares as trustee for Charlotte Lee Hartwell Chater; and at the same time executed and delivered a declaration of trust (a copy of which is hereto annexed, made a part hereof and marked Exhibit "A").

That Juliette, Dorothy, Bernice, Lottie Lee and Mabel, named in said declaration, are daughters of said Alfred S. Hartwell; the said Alfred S. Hartwell intending by "Lottie Lee" to mean his daughter, said Charlotte Lee Hartwell Chater, the said certificate having been issued to said Alfred W. Carter in his name as trustee for Charlotte Lee Hartwell Chater, and so reciting on its face;
4 by "Mr. Chater" to mean the complainant, Charles H. Chater; by "Mabel," his daughter, the defendant, Mabel R. Hartwell; and by "Alexander & Baldwin," to mean the corporation of Alexander & Baldwin, Limited, the agents for said Hawaiian Sugar Com-

pany, through whom dividends on the stock were paid. That on said 27th day of March, 1909, said Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for 250 shares, which, as recited in said declaration of trust, had been given to said Charlotte Lee Hartwell Chater by her father before her marriage.

That said 585 shares so issued to said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater were held by said defendant, Alfred W. Carter, as such trustee with the knowledge and approval of said Charlotte Lee Hartwell Chater and the dividends thereon paid to her during her lifetime, and were thereafter held by him up *ot* the 29th day of November, 1909, when, at the request of said Alfred S. Hartwell, but without the knowledge or consent and against the will of the complainants, and without right, the defendant, Alfred W. Carter, as trustee, endorsed said certificate for 585 shares so issued *ot* him as trustee for Charlotte Lee Hartwell Chater to the said Alfred S. Hartwell, who caused a new certificate to be issued upon said date to him in his own name by the defendant the Hawaiian Sugar Company.

That thereafter, on the 18th day of May, 1910, the said Alfred S. Hartwell transferred said certificate for 585 shares of stock in said defendant company to the defendant, Mabel R. Hartwell, and the said defendant the Hawaiian Sugar Company issued a certificate on that date to said defendant Mabel R. Hartwell in her name for said 585 shares.

That thereafter, on the 1st day of July, 1910, the said defendant, the Hawaiian Sugar Company, declared a stock dividend of fifty per cent., the proportion upon said 585 shares being 292½ shares; and on the 2nd day of July, 1910, the said Hawaiian Sugar Company issued a new certificate for 1,552 shares to the said Mabel R. Hartwell for the shares standing in her name in said company, which included the said 585 shares and said 292½ shares, and that the said shares are still standing in the name of said Mabel R. Hartwell.

That the complainants are informed and believe, and thereupon aver, that at the time of said transfer from Alfred S. Hartwell to Mabel R. Hartwell the said Mabel R. Hartwell had knowledge of all the matters and things heretofore alleged and of the rights of the complainants to said stock, and that the said transfer was made without consideration; but whether upon some secret trust or agreement, or whether the same was a gift, the complainants have no information.

III.

The complainants are informed and believe, and therefore allege, that since the death of said Charlotte Lee Hartwell Chater the said Hawaiian Sugar Company, defendant, has paid at sundry times upon said stock, and the said issue of new stock as a dividend upon the original stock, to the said Alfred W. Carter, Alfred S. Hartwell and Mabel R. Hartwell at various times sums amounting to Twelve Thousand Nine Hundred Eighty-two Dollars ($12,982), of which

amount Twelve Thousand Two Hundred Thirteen and 25/100 Dollars ($12,213.25) was paid before the 1st day of January, 1913, of which amount One Thousand Nine Hundred Thirty-three and 50/100 ($1,933.50) was paid to said Alfred W. Carter and the said Alfred S. Hartwell before the transfer of said stock to Mabel R. Hartwell and the remainder to said Mabel R. Hartweell after said transfer.

6 IV.

That the complainants have at various times demanded of the defendant Alfred W. Carter, as trustee, and Alfred W. Carter as executor, to account for the dividends which have been paid upon said stock since the death of said Charlotte Lee Hartwell Chater, and also to transfer to the said Charles H. Chater as guardian of Charles Hartwell Chater the said 585 shares of stock of the Hawaiian Sugar Company, the stock dividend on the same of 292½ shares, and all cash dividends on the same by whomsoever received; but the said Alfred W. Carter as trustee and Alfred W. Carter as executor has neglected and refused to account for or to turn over said stock or said dividends.

V.

That the said Estate of Charlotte Lee Hartwell Chater is not indebted to anyone, and that the only heirs are the complainants, Charles H. Chater and Charles Hartwell Chater, and that the said Charles H. Chater as administrator and personally submits his rights as such administrator and personally in this matter to the court, and consents that said shares and said dividends should be accounted for to the said Charles H. Chater as guardian for said Charles Hartwell Chater.

Wherefore, the complainants pray:

(1) That the defendant, the Hawaiian Sugar Company, may be enjoined from making any transfer or other disposition of said stock, namely, said 585 shares of original stock and said 292½ shares of new stock issued as a dividend upon the same, and from paying any dividends upon said stock and said issue of new stock, until the determination of this cause.

(2) That the said Hawaiian Sugar Company be directed to disclose what dividends it has declared on said stock since the said 3rd day of September, 1909, and to whom the same have been
7 paid, including therein the amount of any stock dividends upon said original 585 shares of stock and to whom the same was issued.

(3) That the defendant, Alfred W. Carter, Trustee, account for said 585 shares of stock and of dividends either of stock or cash made upon the same or upon any new stock issued as a dividend upon the same since the 3rd day of September, 1909, together with interest upon said dividends from the time when they were due and payable.

(4) That the said Alfred W. Carter as executor account for any

proceeds of said stock or dividends upon the same which the said Alfred S. Hartwell may have received in his lifetime.

(5) That the defendant, Mabel R. Hartwell, be ordered to transfer said 585 shares of stock, together with 292½ shares of new stock issued as a dividend thereon, to the complainant, Charles H. Chater, as guardian for Charles Hartwell Chater, and to account for any dividends received upon the said stock and said new stock, with interest thereon from the date of the receipt of such dividends.

(6) That the defendant the Hawaiian Sugar Company be directed to issue to the complainant, Charles H. Chater, as guardian for Charles Hartwell Chater, 877½ shares of its stock, in lieu of said shares issued to the defendant, Mabel R. Hartwell.

(7) And for such other and further relief as in the premises may to this court seem meet.

Dated, Honolulu, T. H., March 18th, 1913.

(S'g'd) CHARLES HARTWELL CHATER,
(A Minor), by His Next Friend and Guardian, Charles H. Chater;
CHARLES H. CHATER,
In His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and
CHARLES H. CHATER,
As Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants.

(S'g'd) By their Attorneys,
CASTLE & WITHINGTON.

By their Attorneys,
CASTLE & WITHINGTON.
Attorneys for Complainants.

8 CITY AND COUNTY OF HONOLULU,
Territory of Hawaii, ss:

David L. Withington, being duly sworn, deposes and says that he is one of the attorneys for the complainants in the above entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, excepting as to those portions alleged on information and belief, and as to such allegations he believes them to be true; that he makes this affidavit in behalf of the complainants, because they and each of them are absent from this jurisdiction.

(S'g'd) DAVID L. WITHINGTON.

Subscribed and sworn to before me this 18th day of March, A. D. 1913.

(S'g'd) W. A. GREENWELL,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

9 EXHIBIT "A."

HONOLULU, T. H., March 27, 1909.

Mr. Alfred W. Carter, City.

DEAR ALFRED: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case
10 the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust fund or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

I also enclose for you to retain for Mable Certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this *althout* it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for her 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

Very truly,

(S'g'd) ALFRED S. HARTWELL.

Filed Mar. 19, 1913. J. A. Dominis, Clerk.

11 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

Chambers Summons.

(Stamps $2.00.)

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, CHARLES H. CHATER et al., Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell & Hawaiian Sugar Co., Defendants.

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the City and County of Honolulu or his Deputy:

You are commanded to summon Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased; Mabel R. Hartwell; and the Hawaiian Sugar Company, a corporation, to appear ten days after service hereof, if they reside in the City and County of Honolulu otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room of said Judge, in the Judiciary Building, in Honolulu, to answer the annexed Bill of Complaint of Charles Hartwell Chater (a minor) by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, deceased.

And you are further commanded, by order of the Honorable Judge of the Circuit Court of the First Circuit and have you then there this Writ with full return of your proceedings thereon.

Witness the Honorable Haney E. Cooper, Judge of the Circuit Court of the First Circuit, at Honolulu, aforesaid, this 18th day of March, 1913.

[SEAL.] (S'g'd) J. A. DOMINIS, *Clerk.*

Section 1769 Revised Laws.—The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

I certify the within Summons and Bill in Equity annexed to be true copies of the original, on file in said Court.

(S'g'd) CHARLES H. ROSE.

Served the within Summons as follows:

On Alfred W. Carter Trustee at Honolulu, this 22nd day of March 1913; on Alfred W. Carter, Executor of the Last Will, and Testa-

ment of Alfred S. Hartwell, deceased at Honolulu, this 22nd day of March 1913; on Hawaiian Sugar Company a Corporation through J. P. Cooke, its president at Honolulu this 22nd day of March 1913, by delivering to each of them a certified copy hereof and of the petition of complaint hereto annexed and at the same time showing them the original.

Dated Honolulu, March 1913.

(S'g'd) CHAS. H. ROSE,
Deputy Sheriff.

[Endorsed:] Original. Eq. 1863. Reg. 2, Pg. 113. Circuit Court, First Circuit. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, v. Alfred W. Carter, Trustee; Alfred W. Carter, Executor; Mabel R. Hartwell; & Hawaiian Sugar Co. Defendants. Chambers Summons. Issued at 9 o'clock A. M., Mar. 19th, 1913, J. A. Dominis, Clerk. Returned at 2:10 o'clock P. M., May 7th, 1913, J. A. Dominis, Clerk. — Service @ $1.00 each —; — Cop. @ $1.50 each —; Expense, —; Total, $—. Honolulu Police Dept. Received Mar. 19, 1913 at 10:4 o'clock A. M. S'g'd F. W. Weed, Clerk.

12 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Answer of Hawaiian Sugar Company, a Corporation, Defendant.

Now comes the Hawaiian Sugar Company, a corporation, defendant herein, and now and at all times hereafter saving to itself all and every benefit of exception to the bill filed herein for its many errors, uncertainties and imperfections, for answer thereunto or to so much thereof as it is advised is material or necessary for it to make answer unto, answering says:

I.

Answering the allegations in paragraph "I" of said bill contained, this defendant admits that it is and was at all times in said bill

mentioned a corporation organized and existing under the laws of the Territory of Hawaii and having a usual place of business
13 at said Honolulu, and not having sufficient information as to the truth of the remaining allegations in said paragraph contained, it denies the same and leaves complainants to their proof thereof.

II.

Answering the allegations in paragraph "II" of said bill contained, this defendant admits that one Alfred S. Hartwell being on the 27th day of March, 1909, the owner of a large number of shares of the capital stock of this defendant caused certain of said shares to be transferred to the name of Alfred W. Carter, Trustee, and particularly caused 585 of such shares to be transferred to said Alfred W. Carter as Trustee for Charlotte Lee Hartwell Chater and caused a certificate to be issued to said Trustee for said 585 shares, reciting in said certificate that the said Alfred W. Carter was the holder of said shares as Trustee for Charlotte Lee Hartwell Chater; that on the 29th day of March, 1909, said Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for 250 shares; that said 585 shares so issued to Alfred W. Carter as Trustee for Charlotte Lee Hartwell Chater were held by said defendant Alfred W. Carter as such Trustee up to the 29th day of November, 1909, when he, said defendant Alfred W. Carter as Trustee, endorsed said certificate for 585 shares so issued to him as Trustee for Charlotte Lee Hartwell Chater to the said Alfred S. Hartwell, who caused a new certificate to be issued upon said date to him in his own name by this defendant; that thereafter on the 18th day of May, 1910, the said Alfred S. Hartwell transferred said certificate for 585 shares of stock in this defendant to the defendant Mabel R. Hartwell, and this defendant issued a certificate on that date to said defendant Mabel R. Hartwell in her name for said 585
14 shares; that thereafter on the first day of July 1910 this defendant declared a stock dividend of fifty per cent, the proportion upon said 585 shares being 292½ shares; that this defendant sold the ½ share and paid the proceeds of said sale to said Mabel R. Hartwell, and on the 2nd day of July 1910 this defendant issued a new certificate for 1552 shares to the said Mabel R. Hartwell for the shares standing in her name in this defendant, which included the said 585 shares and said 292 shares, and that the said shares are still standing in the name of said Mabel R. Hartwell.

Answering the remaining allegations in said paragraph "II" of said bill contained, this defendant not having sufficient information as to the truth thereof denies the same and leaves complainants to their proof thereof.

III.

Answering the allegations in paragraph "III" of said bill, this defendant alleges that it has paid at sundry times between September 3, 1909 and March 18, 1913, upon said 585 and said 292 shares of stock to the said Alfred W. Carter, Alfred S. Hartwell and Mabel

R. Hartwell, sums amounting to $14,472.30, of which amount $13,683. was paid before the first day of January, 1913, of which amount $2574. was paid to said Alfred W. Carter and the said Alfred S. Hartwell before the transfer of said stock to Mabel R. Hartwell, and the remainder to the said Mabel R. Hartwell after said transfer.

IV.

Answering the allegations in paragraph "IV" of said bill contained, this defendant not having sufficient information as to the truth thereof denies the same and leaves complainants to their proof thereof.

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V.

Answering the allegations in paragraph "V" in said bill contained, this defendant not having sufficient information as to the truth of the allegations therein contained, to-wit, that the Estate of said Charlotte Lee Hartwell Chater is not indebted to anyone, and that the only heirs are the complainants Charles H. Chater and Charles Hartwell Chater, denies the same and leaves complainants to their proof thereof.

Wherefore this defendant, having fully answered, confessed, traversed and denied all of the matters in said bill material to be answered, prays that it may be dismissed hence with its costs in this behalf most wrongfully incurred, and for such other, further and general relief as may be meet in the premises.

And this defendant will ever pray.

Honolulu, April 1st, 1913.

HAWAIIAN SUGAR COMPANY, *Defendant,*

(S) By J. WATERHOUSE, *Treasurer.* [SEAL.]
J. B.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

J. Waterhouse, being duly sworn, says that he is the Treasurer of the Hawaiian Sugar Company, one of the defendants in the above cause; that he has read the foregoing Answer and knows the contents thereof, and that the same is true to the best of his knowledge and belief; and that he signed said Answer and makes this affidavit on behalf of said Hawaiian Sugar Company, being duly authorised thereunto.

(S'g'd) J. WATERHOUSE.

Subscribed and sworn to before me this 1st day of April, 1913.

[SEAL.] (S'g'd) JNO. GUILD,
Notary Public, First Judicial Circuit, Territory of Hawaii.

16 Endorsed: E. No. 1863. Reg. 2, Pg. 112. Circuit Court, First Circuit Territory of Hawaii. At Chambers. In Equity. Charles Hartwell Chater, a minor by his next friend and Guardian Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, Trustee, et al., Defendants. Bill in Equity. Answer of Hawaiian Sugar Co. a Corporation, defendant. Filed April 1st, 1913 at 4:20 P. M. J. A. Dominis, Clerk. Prosser, Anderson & Marx, 303 Stangenwald Building Honolulu, Attorneys for Hawaiian Sugar Co.

17 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell; and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Answer of Mabel R. Hartwell, Defendant.

Now comes Mabel R. Hartwell, defendant herein, and now and at all times hereafter saving to herself all and every benefit of exception to the bill filed herein for its many errors, uncertainties and imperfections, for answer thereunto, or to so much thereof as she is advised is material or necessary for her to make answer unto, answering says:

I.

Answering the allegations in paragraph "I" of said bill contained, this defendant admits the allegations contained in the first, fourth and fifth sub-paragraphs in said paragraph "I" contained, and not having sufficient information as to the truth of the remaining allegations in said paragraph "I" contained, she neither
18 admits nor denies the same, but leaves complainants to their proof thereof.

II.

Answering the allegations in paragraph "II" of said bill contained, this defendant admits the allegations contained in the first, second, fourth and fifth sub-paragraphs in said paragraph "II"

contained, except that this defendant alleges that the new certificate issued by the Hawaiian Sugar Company to this defendant on July 2, 1910, referred to in said fifth sub-paragraph included 292 shares of the stock dividend of 585 shares, the one-half share having been sold by said Hawaiian Sugar Company and the proceeds of said sale paid to this defendant.

Answering the allegations contained in the third sub-paragraph of said paragraph "II", this defendant admits the allegations contained in said third sub-paragraph except that this defendant denies that Alfred W. Carter as Trustee endorsed the certificate for 585 shares mentioned therein to Alfred S. Hartwell without right, but this defendant alleges on the contrary that said Alfred W. Carter endorsed said certificate to said Alfred S. Hartwell rightfully, equitably and lawfully and under and according to the duties and obligations imposed upon him as said Trustee.

Answering the allegations in the sixth sub-paragraph of said paragraph "II" contained, this defendant admits that the transfer of said 585 shares from Alfred S. Hartwell to this defendant on May 18, 1910, was made without consideration and was a gift and was not made upon any secret trust or agreement, but this defendant denies that she had knowledge of all the matters and things theretofore alleged in said bill of complaint and of the alleged rights of the complainants to said stock, this defendant alleging
19 on the contrary in this connection that at the time said Alfred S. Hartwell transferred said 585 shares to this defendant and for a long time thereafter she, this defendant, did not know the terms of the trust under which said Alfred W. Carter had formerly held shares of stock of the Hawaiian Sugar Company in trust for Charlotte Lee Hartwell Chater or the number of said shares so held in trust by him, and did not know that said Alfred W. Carter had transferred said stock back to said Alfred S. Hartwell, and did not know that the said stock transferred to this defendant by said Alfred S. Hartwell was the same stock in whole or in part which had been previously held by said Alfred W. Carter as Trustee.

III.

Answering the allegations in paragraph "III" of said bill contained, this defendant admits that the said Hawaiian Sugar Company, defendant, has paid at sundry times between September 3, 1909, and March 18, 1913, upon said 585 and said 292 shares of stock to the said Alfred W. Carter, Alfred S. Hartwell and this defendant, sums amounting to $14,472.30, of which amount $13,683.00 was paid before the first day of January, 1913, of which amount $2574.00 was paid to said Alfred W. Carter and the said Alfred S. Hartwell, before the transfer of said stock to Mabel R. Hartwell, and the remainder to the said Mabel R. Hartwell after said transfer.

IV.

Answering the allegations in paragraph "IV" of said bill contained, this defendant admits the same.

V.

Answering the allegations in paragraph "V" of said bill contained, this defendant admits that the only heirs of Charlotte Lee Hartwell Chater are the complainants, Charles H. Chater and
20 Charles Hartwell Chater, and not having sufficient information as to the truth of the allegations therein contained that the said Estate of said Charlotte Lee Hartwell Chater is not indebted to anyone, this defendant neither admits nor denies the same, but leaves complainants to their proof thereof.

Wherefore, this defendant having fully answered, confessed, traversed and denied all of the matters in said bill material to be answered, prays that she may be dismissed hence with her costs in this behalf most wrongfully incurred, and for such other, further and general relief as may be meet in the premises.

And this defendant will ever pray.

Dated, Honolulu, April 30th, 1913.

(S'g'd) MABEL R. HARTWELL,
Defendant,

By (S'g'd) ALFRED W. CARTER.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Alfred W. Carter, being duly sworn, says that he is the Alfred W. Carter who signed the foregoing answer on behalf of Mabel R. Hartwell, defendant in the above entitled cause; that said Mabel R. Hartwell is and for some years last past has been absent from the Territory of Hawaii, and that she duly and expressly authorized him to accept service in this suit on her behalf and to answer the complaint herein on her behalf; that he has read the foregoing answer and knows the contents thereof, and that the same
21 is true excepting as to the allegations set forth in answer to the allegations contained in the sixth sub-paragraph of paragraph "II" of said complaint, and as to such allegations, that he, on information received from the said Mabel R. Hartwell and on his own belief, believes them to be true.

(S'g'd) ALFRED W. CARTER.

Subscribed and sworn to before me this 30th day of April 1913.

[SEAL.] (S'g'd) T. EDGAR ROBINSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: E. No. 1863. Reg. 2 Pg. 112. Circuit Court, First Circuit Territory of Hawaii. At Chambers. In Equity. Charles Hartwell Chater (a minor), by his next friend and guardian Charles H. Chater, et al., Plaintiffs, vs. Alfred W. Carter, Trustee; et al., Defendants. Bill in Equity. Answer of Mabel R. Hartwell, Defendant. —— —— Judge. Filed Apr. 30, 1913, at 3:30 P. M. J. A. Dominis, Clerk. Prosser, Anderson & Marx, 303 Stangenwald Building Honolulu Attorneys for Mabel R. Hartwell.

22 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by his Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell; and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Amended Answer of Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased, Defendant.

Now comes Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased, defendant herein, and now and at all times hereafter saving to himself all and every benefit of exception to the bill filed herein for its many errors, uncertainties and imperfections, for answer thereunto, or to so much thereof as he is advised is material or necessary for him to make answer unto, answering says:

I.

Answering the allegations in paragraph "I" of said bill contained, this defendant admits the allegations contained in the first, fourth and fifth sub-paragraphs in said paragraph "I" contained,
23 and not having sufficient information as to the truth of the remaining allegations in said paragraph "I" contained, he neither admits nor denies the same, but leaves complainants to their proof thereof.

II.

Answering the allegations in paragraph "II" of said bill contained, this defendant admits the allegations contained in the first, second, fourth and fifth sub-paragraphs in said paragraph "II" contained, except that this defendant alleges that the new certificate issued by the Hawaiian Sugar Company to Mabel R. Hartwell on July 2, 1910, referred to in said fifth sub-paragraph included 292 shares of the stock dividend on 585 shares, the one-half share having been sold by said Hawaiian Sugar Company and the proceeds of said sale paid to Mabel R. Hartwell.

Answering the allegations contained in the third sub-paragraph of said paragraph "II", this defendant admits the allegations contained in said third sub-paragraph except that this defendant denies that he, said Alfred W. Carter as Trustee, endorsed the certificate

for 585 shares mentioned therein to Alfred S. Hartwell without right, but this defendant alleges on the contrary that he as said Trustee endorsed said certificate to said Alfred S. Hartwell rightfully, equitably and lawfully and under and according to the duties and obligations imposed upon him as said Trustee, and that he as said Trustee acted in good faith.

Answering the allegations in the sixth sub-paragraph of said paragraph "II" contained, this defendant admits that the transfer of said 585 shares from Alfred S. Hartwell to Mabel R. Hartwell on May 18, 1910, was made without consideration and was a gift, and was not made upon any secret trust or agreement, and not having sufficient information as to the truth of the remaining
24 allegations in said sixth sub-paragraph of paragraph "II" contained, this defendant neither admits nor denies the same, but leaves complainants to their proof thereof.

Further answering the allegations in the fourth sub-paragraph of said paragraph "II" contained, this defendant alleges that said Alfred S. Hartwell rightfully, equitably and lawfully, as absolute owner of said 585 shares of stock, free from any trust, transferred said certificate for said 585 shares of stock on the 18th day of May, 1910, to said Mabel R. Hartwell, and this defendant alleges on information and belief that said Alfred S. Hartwell in transferring said certificate of stock as aforesaid acted in good faith.

III.

Answering the allegations in paragraph "III" of said bill contained, this defendant admits that the said Hawaiian Sugar Company, defendant, has paid at sundry times between September 3, 1909, and March 18, 1913, upon said 585 and said 292 shares of stock to the said Alfred W. Carter, Alfred S. Hartwell and Mabel R. Hartwell, sums amounting to $14,472.30, of which amount $13,683.00 was paid before the first day of January, 1913, of which amount $2,574.00 was paid to said Alfred W. Carter and the said Alfred S. Hartwell before the transfer of said stock to Mabel R. Hartwell, and the remainder to the said Mabel R. Hartwell after said transfer.

IV.

Answering the allegations in paragraph "IV" of said bill contained, this defendant admits the same.

V.

Answering the allegations in paragraph "V" of said bill contained, this defendant admits that the only heirs of Charlotte Lee Hartwell Chater are the complainants, Charles H. Chater and Charles Hartwell Chater, and not having sufficient information as to the truth of the allegation therein contained that
25 the said Estate of said Charlotte Lee Hartwell Chater is not indebted to anyone, this defendant neither admits nor denies the same, but leaves complainants to their proof thereof.

Wherefore, this defendant having fully answered, confessed, traversed and denied all of the matters in said bill material to be answered, prays that he may be dismissed hence with his costs in this behalf most wrongfully incurred, and for such other, further and general relief as may be meet in the premises.

And this defendant will ever pray.

Honolulu, May 21st, 1913.

(S'g'd) ALFRED W. CARTER,
Executor Under the Last Will and Testament of Alfred S. Hartwell, Deceased, Defendant.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Alfred W. Carter, being duly sworn, says that he is the Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased, named as defendant in the above entitled cause, and who signed the foregoing Amended Answer; that he has read the foregoing Amended Answer and knows the contents thereof, and that the same is true, excepting as to those portions alleged on information and belief and as to such allegations that he believes them to be true.

(S'g'd) ALFRED W. CARTER.

Subscribed and sworn to before me this 21st day of May, 1913.

[SEAL.] (S'g'd) T. EDGAR ROBINSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: E. No. 1863. Reg. 2, Pg. 112. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, Trustee, et al., Defendants. Amended Answer of Alfred W. Carter, Executor of Last Will and Testament of Alfred S. Hartwell, Deceased, Defendant. —— —— Judge. Filed May 21, 1913, at 3:20 P. M. J. A. Dominis, Clerk. Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu. Attorneys for A. W. Carter, Executor.

26 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by his Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell; and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Amended Answer of Alfred W. Carter, Trustee, Defendant.

Now comes Alfred W. Carter, Trustee, defendant herein, and now and at all times hereafter saving to himself all and every benefit of exception to the bill filed herein for its many errors, uncertainties and imperfections, for answer thereunto, or to so much thereof as he is advised is material or necessary for him to make answer unto, answering says:

I.

Answering the allegations in paragraph "I" of said bill contained, this defendants admits the allegations contained in the first, fourth and fifth sub-paragraphs in said paragraph "I" contained, and not having sufficient information as to the truth of the remaining allegations in said paragraph "I", he neither admits no denies
27 the same, but leaves complainants to their proof thereof.

II.

Answering the allegations in paragraph "II" of said bill contained, this defendant admits the allegations contained in the first, second, fourth and fifth sub-paragraphs in said paragraph "II" contained, except that this defendant alleges that the new certificate issued by the Hawaiian Sugar Company to Mabel R. Hartwell on July 2, 1910, referred to in said fifth sub-paragraph included 292 shares of the stock dividend on 585 shares, the one-half share having been sold by said Hawaiian Sugar Company and the proceeds of said sale paid to Mabel R. Hartwell.

Answering the allegations contained in the third sub-paragraph of said paragraph "II", this defendant admits the allegations contained in said third sub-paragraph, except that this defendant denies that he endorsed the certificate for 585 shares mentioned therein to Alfred S. Hartwell without right, but this defendant alleges on

the contrary that he endorsed said certificate to said Alfred S. Hartwell rightfully, equitably and lawfully, and under and according to the duties and obligations imposed upon him as said Trustee, and that this defendant acted in good faith.

Answering the allegations in the sixth sub-paragraph of said paragraph "II" contained, this defendant admits that the transfer of said 585 shares from Alfred S. Hartwell to Mabel R. Hartwell on May 18, 1910, was made without consideration and was a gift, and was not made upon any secret trust or agreement, and not having sufficient information as to the truth of the remaining allegations in said sixth sub-paragraph of paragraph "II" contained, this defendant neither admits nor denies the same, but leaves complainants to their proof thereof.

28

III.

Answering the allegations in paragraph "III" of said bill contained, this defendant admits that the said Hawaiian Sugar Company, defendant, has paid at sundry times between September 3, 1909, and March 18, 1913, upon said 585 and said 292 shares of stock to the said Alfred W. Carter, Alfred S. Hartwell and Mabel R. Hartwell, sums amounting to $14,472.30, of which amount $13,683.00 was paid before the first day of January, 1913, of which amount $2,574.00 was paid to said Alfred W. Carter and the said Alfred S. Hartwell before the transfer of said stock to Mabel R. Hartwell, and the remainder to the said Mabel R. Hartwell after said transfer.

IV.

Answering the allegations in paragraph "IV" of said bill contained, this defendant admits the same.

V.

Answering the allegations in paragraph "V" of said bill contained, this defendant admits that the only heirs of Charlotte Lee Hartwell Chater are the complainants, Charles H. Chater and Charles Hartwell Chater, and not having sufficient information as to the truth of the allegation therein contained that the said Estate of said Charlotte Lee Hartwell Chater is not indebted to anyone, this defendant neither admits nor denies the same, but leaves complainants to their proof thereof.

Wherefore, this defendant having fully answered, confessed, traversed and denied all of the matters in said bill material to be answered, prays that he may be dismissed hence with his costs in this behalf most wrongfully incurred, and for such other, further
29 and general relief as may be meet in the premises.

And this defendant will ever pray.

Honolulu, May 21st, 1913.

(S'g'd) ALFRED W. CARTER, *Trustee.*

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Alfred W. Carter, being duly sworn, says that he is the Alfred W. Carter, Trustee, named as defendant in the above entitled cause, and who signed the foregoing Amended Answer; that he has read the foregoing Amended Answer and knows the contents thereof, and that the same is true.

(S'g'd) ALFRED W. CARTER.

Subscribed and sworn to before me this 21st day of May, 1913.

[SEAL.] (S'g'd) T. EDGAR ROBINSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: E. No. 1863. Reg. 2, Pg. 112. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, Trustee, et al., Defendants. Amended Answer of Alfred W. Carter, Trustee, Def't. —— —— Judge. Filed May 21, 1913, at 3:20 P. M. J. A. Dominis, Clerk. Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu. Attorneys for A. W. Carter, Trustee.

30 In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

Equity, 1863.

CHARLES HARTWELL CHATER (a Minor) by His Next Friend and Guardian, CHARLES H. CHATER, et al., Complainants,
vs.
ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor; MABEL R. HARTWELL, & HAWAIIAN SUGAR CO., Defendants.

Decision.

March 27, 1909, Alfred S. Hartwell transferred 585 shares of Hawaiian Sugar Co., stock to Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater and with the certificate delivered to Mr. Carter a letter, the parts referring to the certificate being as follows:

"DEAR ALFRED: I enclose certificate in your name as trustee for —— —— another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares * * *

The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with

power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living, among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family * * *

I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and —— —— on the 15th of each month their dividends, I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividend directly to them from New York, in which case there would be a charge of 20 ct., a hundred unless they shall accede to my request to make no charge for exchange.

* * * I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

Very truly,

ALFRED S. HARTWELL.

31 This is an informal letter not a carefully drawn document. It makes no provision for the dividends between March 27, 1909 and Jan. 1, 1910; nor for the dividends for the three years' period should Lottie Lee be dead and it be impossible to pay them to her; nor for the stock should she not be living at the end of the three years.

Charlotte Lee Hartwell Chater (Lottie Lee) died in childbirth Sept. 3, 1909; the child Charles Hartwell Chater survived her and is still living.

Petitioners claim that under the trust either Lottie Lee's son or estate is entitled to the stock and all dividends since Sept. 3, 1909, (the husband's interest being given by him to the son). Defendants claim that with the death of Charlotte Lee Hartwell Chater the trust came to an end and the settlor became entitled to the stock and dividends.

Alfred S. Hartwell at the time was a judge of the Supreme Court of Hawaii and one of long service. He knew the rules of the construction of wills and trusts. Reading this document with Judge Hartwell's legal learning in mind leads one irresistably to the conclusion that it was written offhand, without revision, and without thought of rules of law and preciseness of language, and that all arguments based on a construction of the instrument as though made by him carefully foreseeing a construction by a court should be rejected. He could undoubtedly have written a document expressing clearly and unmistakably what he wished to have done with the stock in this case. I think it just as clear that he did not write this letter having in mind the arguments as to its construction that might be made should Charlotte Lee Hartwell Chater die when she did and Charles Hartwell Chater survive her.

What weight, then, should be given this document? Plaintiff claims that the delivery of the certificates itself to Carter reading

"Alfred W. Carter trustee for Charlotte Lee Hartwell Chater"
32 gave her a vested interest in the entire stock, and that there can therefore be no interest unprovided for to revert to the settlor and that the letter if incomplete in any respect can not give back to Hartwell any interest. The defendants claim that the letter expresses the entire trust and that the certificate gave the entire interest to Carter and no interests to Charlotte Lee Hartwell Chater not to be found in the letter.

The letter does more than "merely transmit a completed gift." When, accompanying a certificate "in trust for Charlotte Lee Hartwell Chater" it says "The trust for Lottie Lee is", it tells what the settlor meant by those words in the certificate. Informal and offhand as the letter is I think that the trust must be found in that letter alone or not at all.

In construing it, the intent of the settlor must govern as found from an examination of the letter itself and all surrounding circumstances. This will override all technical rules of construction which are aids in finding the intent and not to be used arbitrarily.

The main contention of plaintiff is that there was a vested interest in the mother that passed to her estate.

Lottie Lee was 32 years old at the time of the creation of the trust and had been married eight months to Chas. H. Chater. Her first and only child was born Sept. 3, 1909, about 5 months after the creation of the trust. Judge Hartwell then may well have contemplated that a child would be born shortly and if so, contemplated the possibility of its death after birth before Jan. 1, 1913, but apparently not that the mother would die before the child. The remark in the letter "my object being, as Mr. Chater will observe, that as to these additional 586 shares they shall remain in my family" shows that he did not wish Mr. Chater to get any interest in these shares. In the same letter he refers to a gift to another married daughter Mabel of 200 shares of stock with no trust
33 attached. This shows that his distrust of Mr. Chater was not one common to all his sons in law.

Defendants infer from this that Judge Hartwell foresaw that his daughter might die in childbirth, and Chater as guardian come in control of his wife's property; that with this in mind he designedly made no gift of dividends prior to Jan. 1, 1910, in order that the trust might fail if she died before that time, but, believing that if she lived until Jan. 1, 1910, she might outlive the child in three years, set that as a time to decide whether she should be given the trust property outright or only a life interest; that he intended the property to return to him if she died before him in the three years, but being on in years thought that if alive in three years she would probably survive him, and so made a special provision in that case. Some of all this may have been in Judge Hartwell's mind but I do not think it can properly be construed into the letter creating the trust. If he had tried to get this into it he could have done it better. That Lottie Lee gave receipts for the first dividends to the trustee shows to my mind that the failure to give those divi-

dends expressly was an oversight and not done designedly for legal effect.

What is definitely done is that the control of the principal fund, the stock, is taken away from Lottie Lee until Jan. 1, 1913; then if she is living she is given power to decide herself whether to take control or leave Carter in charge, (i. e. practically whether it shall be left free from any control of her husband) unless she has no child living in which case she is not given the power to decide, but the trustee is to keep control of the fund giving her only the dividends and at her death give the stock (not to later born children but) to her sisters or their children.

Once it is decided that the mere delivery of the certificates is not a completed gift of a vested interest to Lottie Lee, but such completed gift must be found in the letter, petitioner's argu-
34 ment on this basis falls, for the trust as stated in the letter is not of a completed gift. To imply a completed gift implication must be piled on implication. The gift of the beneficial interest in dividends until Jan. 1, 1910, is not express but must be implied from the later gift of dividends and the acts of the parties; that the trustee should pay the dividends from Jan. 1, 1910 to Jan. 1, 1913 not only to Lottie Lee but to her estate must be implied. Her right to the stock in 1913 is expressly stated to be if she shall then be living and shall make request in writing, and to make a completed gift the implication must ignore part of the very phrase from which the implication should arise. There is no gift of the stock to Lottie Lee except in the instruction to the trustee to pay it to her or hold it for her according to her written instructions if she be living. I see no inference from this that gives an heir or executor the right to make the written request, or that gives the stock to her estate if she be dead.

To give the stock to her estate if she be dead the words "if she shall then be living" and "as she may in writing request" must be ignored. They can not be construed away. No construction of "if" *as* "When" or anything else will suffice. This clause is not a condition subsequent for the interest in the stock is not elsewhere given. In the cases cited by petitioners where "if" has been explained away the use is either a condition subsequent or the circumstances otherwise differ materially from this.

The claim that because of the gift of dividends prior to Jan. 1, 1913 and because law favors a vested interest her interest should be considered as vested, subject only to be divested in case she had no child living at that date, not only is faulty as requiring also a forced disregard of the "if" clause, but rests mainly on a long line of cases con-truing wills. The construction of trusts created by wills needs artificial aid and forced rules of construction
35 far more than trusts created inter vivos. The presumption against intestacy is not matched by a presumption of equal force in a trust created inter vivos. The man making a will is presumably giving everything away for he is naming his heirs. The living man can have little objection to a failure of trust in his own lifetime. He can easily straighten matters out. Even in the case of wills

and implication must be strong. "The decision * * * depends upon the intention of the testator as manifested by the words that he has used, and an ommision to express his intention cannot be supplied to conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply this defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

Metcalf vs. Framingham Parish, 128 Mass. 370, 374.
Robison vs. Portland Orphan Asylum, 123 U. S. 707.

A construction that will meet all contingencies is of course to be favored but not to be forced. To argue for a vested interest here because of the gift of dividends or against it because of the failure to give dividends prior to Jan. 1, 1910, seems to me to force a construction where imperative necessity does not require it.

Again, the phrase "my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family" shows one thing definitely; that Judge Hartwell did not intend these shares to pass to Mr. Chater, and any construction which gives him an interest should be avoided if possible, as otherwise the intent of the testator will be frustrated.

36 Similarly, the argument drawn from a long line of authorities that if the child had died before Jan. 1, 1913, there would be an implied gift over to the sisters, with the inference from this there can be no right left between the death of Mrs. Chater and the 1st of January in the donor, does not weigh with me.

These constructions are based on rules which are supposed to be not arbitrary but aids in attaining the intent of the settlor (in most cases the testator). To follow them here seems to me to force an unnatural construction.

Petitioner also claims that the dividends from the death of Mrs. Chater to Jan. 1913 belong to the estate because of the express direction to the trustee with no reservation to pay the dividends to Mrs. Chater during the three years from "next January." This does not include the dividends up to January. As to the dividends after "next January" to carry out the direction exactly was impossible on account of Mrs. Chater's death for there was no direct gift to her but a direction to pay to her. In this case I do not think the implication follows that she had an absolute equitable interest in the dividends that would pass to her legatees.

There remains the alternative claim of plaintiff that there is an implied gift of the stock and dividends since the death of Lottie to her child. Nothing is expressly given a child born before Jan. 1, 1913, and all children *both* after Jan. 1, 1913, are cut off by an express gift to Lottie Lee's sister. The implication, if any, must arise from the gift of full control of the stock given the mother in 1913 unless she have no child living and the general rule that a grandfather will be implied to desire to provide for a grandson.

All the cases quoted in which such an implication is made are testamentary in which the testator is disposing of all his property. The implication is far weaker as shown above in a trust created inter vivos and generally requires a less contingent gift of the
37 principal and more interest shown in the child. Where there is no completed gift but only an instruction as here to the trustee to pay on a contingency at some future time, the implication may not arise.

My conclusion, then, is that the trust failed, because upon the death of Mrs. Chater it became impossible for the trustee to carry out any terms of the trust. To reconvey the property to Hartwell was then proper. The executor and legatees of Mrs. Chater certainly can not complain.

The objections of petitioners to a resulting trust being found here refer to a different and more usual class of resulting trusts. This type of resulting trusts is a well recognized one.

3 Pomeroy's Equity Jurisprudence, Section 1032.

Elphinstone's Interpretation of Deeds, p. 294, Rule 115, and the exception of Elphinstone are distinguishable from this case.

This conclusion is reached without reference to the acts of the settlor which are among the admitted facts of this case. The trustee after the death of Lottie Lee returned the certificate to Judge Hartwell to whom a new certificate was issued Nov. 29, 1909, for these shares and May 18, 1910, Judge Hartwell gave them to his daughter Mabel. If this may be considered in connection with the construction of the trust it leaves no doubt that the conclusion above reached is correct. Judge Hartwell was the same man Nov. 29, 1909 that he was March 27, 1909. No change of circumstances is shown which might alter his sentiments towards the Chaters. If he *is* making the trust intended that on the death of Lottie Lee before 1913 leaving a child, the stock should be paid to her estate or to her son, he had the power in November to and naturally would effectuate that intention by transferring the estate to the administrator of the estate or to the boy. Under the rule that parol testimony may not be received to add to or to vary the terms of a written instrument testimony of a grantor as to the meaning of his deed is generally not admissible. It must be gotten from the
38 deed itself. No testimony can be received which will cause any implication to be made which would not be made without it. But I am not sure that evidence may not be received which neither varies nor adds to the deed, but merely prevents an erroneous and unnecessary implication from being adopted. There are exceptions to the rule against parole testimony under which the surrounding circumstances under which the deed was made may be given. In various other connections evidence has been admitted which is not inconsistent with the writing, 17 Cyc. 638 C2; to aid an inference which may be deduced from the written instrument, 17 Cyc. 640 C3; and to clear up an ambiguity by reason of which the intention of the parties is not definitely expressed, 17 Cyc. 670 XI.

A decree will be entered dismissing the bill at petitioners' costs. Dated Honolulu, Nov. 4, 1913.

(Sgd.) LYLE A. DICKEY, *Judge.*

Endorsed: Equity 1863. Reg. 2/112. Circuit Court, First Circuit, Territory of Hawaii. Charles Hartwell Chater (a minor) by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, trustee; Alfred W. Carter, Executor; Mabel R. Hartwell & Hawaiian Sugar Co., defendants. Decision. Filed Nov. 4, 1913, 11:15 o'clock A. M. C. A. K. Hopkins, Clerk.

39 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater in His Own Right and as Guardian of Said Charles Hartwell Chater (a Minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Decree.

This cause coming on for hearing on the bill, answers and statement of facts agree don by the parties, and after hearing argument of counsel, the court having filed its decision in writing; it is

Ordered, Adjudged and Decreed: That the bill be dismissed and that the defendants recover their costs against the plaintiffs taxed at $21.00.

Dated, Honolulu, November 4, 1913.

(Sgd.) LYLE A. DICKEY, *Judge.*

40 Endorsed: Original. Equity No. 1863. 2/112. Circuit Court First Circuit, Territory of Hawai,. Charles Hartwell Chater, (a minor), by his next friend and guardian, Charles H. Chater, et al., complainants, vs. Alfred W. Carter, Trustee, Alfred W. Carter, Executor, Mabel R. Hartwell & Hawaiian Sugar Co., defendants. Decree. Filed November 4th, 1913, 3:22 P. M. Job Batchelor, Clerk. Castle & Withington, attorneys for complainants.

41 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of Said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Appeal.

Now come the plaintiffs in the above entitled cause and appeal to the Supreme Court of the Territory of Hawaii from the decision and decree entered in said cause upon the 4th day of November, 1913, and from the whole thereof.

Dated, Honolulu, November 8th, 1913.

(S'g'd.) CASTLE & WITHINGTON,
Attorneys for Complainants.

42 Endorsed: Original. Equity 1863. Reg. 2, Pg. 112. Circuit Court First Circuit, Territory of Hawaii. Charles Hartwell Chater (a minor) by his next friend and guardian, Charles H. Chater, et al., complainants, vs. Alfred W. Carter, Trustee, Alfred W. Carter, Executor, Mabel R. Hartwell & Hawaiian Sugar Co., defendants. Appeal. Filed Nov. 8, 1913, 10:40 A. M. J. A. Dominis, Clerk. Castle & Withington, attorneys for complainants.

43 In the Supreme Court of the Territory of Hawaii (October, 1913, Term).

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of Said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell, Chater, Deceased, Plaintiffs-Appellants.

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Respondents-Appellees.

Bill in Equity.

Motion for Admission of Newly Discovered Evidence.

Now come the plaintiffs-appellants, and move that, under the provisions of Section 1860 of the Revised Laws of the Territory of Hawaii, certain newly discovered evidence material to the just decision of the appeal, to wit, a letter from Hon. Alfred S. Hartwell dated March 29, 1909, to the plaintiff, Charles H. Chater (a copy of which letter is attached to the affidavit of David L. Withington, filed herewith), may be admitted in this court in evidence in this proceeding.

Further, plaintiffs-appellants move that they may be allowed to introduce in evidence a certified copy of the proceedings in the probate court of the County of Middlesex, Commonwealth of Massachusetts, in the matter of the appointment of Charles H. Chater as guardian of Charles Hartwell Chater, for the purpose of
44 correcting an error in the statement of facts, and showing that said Charles Hartwell Chater was born on the 30th day of August, 1909.

(S.) CASTLE & WITHINGTON,

Attorneys for Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Plaintiffs-Appellants.

Notice.

To Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, and

To Messrs. Frear, Prosser, Anderson & Marx, their Attorneys:

Please take notice that plaintiffs-appellants will move the court on Monday, the 29th day of December, 1913, or as soon thereafter

as they can be heard, at the court-room of the Supreme Court, to grant the foregoing motion and admit the evidence therein referred to.

This motion will be based on the records and files in this proceeding, the affidavit of David L. Withington herewith presented, and a certified copy of the proceedings in the probate court of the County of Middlesex, Commonwealth of Massachusetts, in the matter of the appointment of Charles H. Chater as guardian of Charles Hartwell Chater.

Dated, Honolulu, T. H., December 23, 1913.

(S.) CASTLE & WITHINGTON,
Attorneys for Plaintiffs-Appellants.

45 In the Supreme Court of the Territory of Hawaii (October, 1913, Term).

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Plaintiffs-Appellants,

v.

ALFRED W. CARTER, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Respondents-Appellees.

Bill in Equity.

Affidavit of David L. Withington.

CITY AND COUNTY OF HONOLULU,
Territory of Hawaii, ss:

David L. Withington, being first duly sworn, deposes and says: That he is now one of the attorneys for the plaintiffs in this action; that he was first employed some time in October or November of 1909 by Mr. Charles H. Chater in the interest of his son, Charles Hartwell Chater, in association with Messrs. Colt & Newell of the Boston Bar and particularly with James M. Newell, Esq., who were then Mr. Chater's counsel, for the purpose of procuring the possession and transfer of two certificates of stock of the defendant and Hawaiian Sugar Company, Limited, then in the possession of the defendant Alfred W. Carter, one of these being a cer-
46 tificate for 250 shares in the name of Charlotte Lee Hartwell Chater and the other a certificate for 585 shares in the name of Alfred W. Carter, Trustee for Charlotte Lee Hartwell Chater.

That affiant had interviews in Boston with Mr. Chater and his attorney, J. M. Newell, Esq., and was instructed by Mr. Chater that

he waived any claim to the 585 shares in favor of his son, Charles Hartwell Chater, and that, in reference to those shares, affiant was to act in the interest of said minor.

That subsequently the plaintiff, Alfred W. Carter, turned over the certificate for 250 shares to Mr. Chater as administrator of his wife, and affiant procured the transfer of such stock on the books of the company by Mr. Chater as administrator, two-thirds to Charles Hartwell Chater and one-third to Charles H. Chater.

That at about the same time affiant, on his return to Hawaii, took up the matter of the ownership of the 585 shares with the defendant Alfred W. Carter, at first with the idea of submitting the questions in issue to the Supreme Court, Chief Justice Hartwell to be a party, but after some negotiation, in August, 1910, Mr. Chater informed affiant that he did not care to pursue the matter further, and at about the same time Messrs. Colt & Newell either withdrew as counsel or ceased to be counsel for Mr. Chater.

That affiant and his firm's connection with the matter was then closed until they were re-employed through the firm of Morse, Kenny & Bell, of Boston, Mr. Bell then acting as counsel for Charles Hartwell Chater and Charles H. Chater, in October, 1912, to represent said minor in the estate of his grandfather, Alfred S. Hartwell, and also with regard to the shares in dispute.

That affiant, when first employed, inquired of Mr. Charles H. Chater in reference to any communications, information or knowledge in regard to the trust which he or Charlotte Lee Hart-
47 well Chater in her lifetime might have had from Chief Justice Hartwell, and understood Mr. Chater to say, in reply, that he had no information and that they had no information other than the fact of the trust contained in the letter of Alfred S. Hartwell to the defendant Alfred W. Carter of March 27, 1909, and affiant understood at the time that this information had been conveyed to Mrs. Chater by her father, either indirectly or orally.

That at no time prior to December, 1913, did affiant or any member of the firm of Castle & Withington have any knowledge, and at no time before November, 1913, as affiant is informed and believes, did the firm of Morse, Kenny & Bell have any knowledge of a certain letter written by Chief Justice Hartwell to Mr. Chater (a copy of which is hereto annexed, marked Exhibit "A" and made a part hereof), which, as affiant is informed and believes, Mr. Charles H. Chater, on or about said last mentioned date, handed to Mr. Bell, who immediately transmitted a copy of the same, and subsequently the original, to the firm of Castle & Withington.

That affiant is informed and believes, and so alleges, that the reason why such letter was not produced at the trial is that the same was shown to Mr. Newell at the time he was acting in the matter, and Mr. Chater understood him to say that the letter was of no value, and continued under that apprehension until the same was shown to Mr. Bell.

Affiant further says that in the agreed statement of facts the date of the birth of said Charles Hartwell Chater is incorrectly stated,

and that the proceedings for the appointment of guardian show the correct date of his birth, viz., August 30, 1909.

That in affiant's judgment the interests of said Charles
48 Hartwell Chater cannot safely be submitted for decision without said letter being before the court.

And further affiant saith not.

(S.) DAVID L. WITHINGTON.

Subscribed and sworn to before me this 23rd day of December, A. D. 1913.

(S.) J. A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

49 EXHIBIT "A."

HONOLULU, T. H., March 29, 1909.

Mr. Charles H. Chater, South Natick, Mass.

MY DEAR MR. CHATER: I have not been a good correspondent for I have had many cares and responsibilities resting upon me.

I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) "to cause the dividends to be paid her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family."

50 I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15 and June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead her- to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there
at any time when it will not interfere with Mable and her
51 family going there. At any rate I have not been there since my sister's death and that will be the place in which I should like to stay, it now seems to me, when I am east in the summers.

You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

Faithfully yours,

(S'g'd) ALFRED S. HARTWELL.

Endorsed: Original. No. 751. Supreme Court. Territory of Hawaii. October 1913 Term. Charles Hartwell Chater (a Minor), by his next friend and guardian Charles H. Chater et al., Plaintiffs-Appellants, vs. Alfred W. Carter, Trustee, et al., Respondents-Appellees. Motion and Affidavit.

Due service of a copy of the within Motion & Aff'd't this day admitted. Dated Dec. 24/1913. Frear, Prosser, Anderson & Marx M. F. P. Attorney for def'ts. Filed December 24, 1913, at 10:20 a. m. J. A. Thompson, Clerk. Castle & Withington Attorneys for Plaintiffs-Appellants.

52 In the Supreme Court of the Territory of Hawaii, October Term, 1913.

Clerk's Minutes.

P. 277.

MONDAY, Dec. 29, 1913.

Court convened at 10:07 o'clock A. M.
Present on the Bench. Hon A. G. M. Robertson, C. J., Hon. Antonio Perry and Hon. J. T. De Bolt, JJ.

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S. C. No. 751.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased,

vs.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation.

Appeal from Circuit Judge, First Circuit.

Hearing Upon Motion by the Plaintiffs for the Admission of Newly Discovered Evidence and Upon a Joint Motion for the Amendment of Stipulation of Facts.

Appearances:

D. L. Withington and A. L. Castle of the firm of Castle & Withington for the plaintiffs.

R. B. Anderson of the firm of Frear, Prosser, Anderson & Marx for defendants.

When the above entitled cause was reached and was called
53 by the court Mr. Withington rose and proceeded to read the motion for admission of newly discovered evidence, he also read the affidavit thereto attached and the exhibit, being a copy of a letter dated March 29, 1909, by Alfred S. Hartwell to Mr. Charles H. Chater.

Chief Justice Robertson here stated to counsel that there is a preliminary question to be disposed of and that is, his possible disqualification in the matter, being a stockholder in the Hawaiian Sugar Co.

Mr. Withington stated that as far as they were concerned they would not raise the point, and that as far as the liability of the Hawaiian Sugar Company is concerned it is very remote.

The Chief Justice asked counsel that if a liability exists at all in the case can it be overlooked.

Mr. Withington replying stated that as to the question of costs that is a matter that can be waived.

Mr. Anderson read to the court the prayer set forth in the petition relative to the Hawaiian Sugar Company.

The court ruled that if the plaintiff will file a waiver of costs against the Hawaiian Sugar Company the objection will be removed.

In reply to the court, Mr. Withington stated that he will today file a waiver of costs against the Hawaiian Sugar Company.

Mr. ANDERSON: As representing all the defendants in the case I would say that we neither oppose nor consent to the granting of this motion for the admission of newly discovered evidence, and we leave the question to the court. We reserve our right if the court grants the motion, to claim on the argument in the case that this newly discovered evidence is neither material nor relevant nor of any weight or importance.

Following the foregoing statement Mr. Anderson argued and stated as to the authenticity of the letter sought to be admitted, and before concluding, he stated that there is a joint motion signed by the parties for an amendment of the stipulation of facts.

54

The COURT: Under the circumstances we think the motion should be granted, and it is granted.

Mr. Withington offered in evidence, Original letter dated March 29, 1909, by Alfred S. Hartwell to Mr. Charles H. Chater, and he stated that instead of the guardianship records going in certain amendments as to the date of the birth of Charles Hartwell Chater be allowed.

The court ruled that the clerk make the necessary amendments and that the motion which seems to be a stipulation be allowed.

Mr. ANDERSON: We have prepared here a changed stipulation of facts and we ask that it be filed.

The COURT: The amendment submitted may be filed.

At 11:05 A. M. the court adjourned until 10 o'clock next Monday morning, January 5, 1914.

J. A. THOMPSON,
Clerk Supreme Court.

55 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation, Defendants.

Bill in Equity.

Amended Stipuation of Facts.

I.

Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the Circuit Court of the First Circuit, Territory of Hawaii, on the 15th day of October, 1912. The defendant, Alfred W. Carter, was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the Supreme Court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the Supreme Court of Hawaii. He was the father of seven daughters all of whom except Charlotte Lee Hartwell Chater now survive, to-wit, the five named in the instrument dated March 27, 1909 attached to the complaint herein marked "Exhibit A", namely: Charlotte

56 Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell and Juliette Hartwell, "Lottie Lee", named in said instrument Exhibit "A", being Charlotte Lee Hartwell Chater, and "Mabel", being Mabel R. Hartwell, and also Madeline Hartwell Judd and Edith Chartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to-wit, on July 15,1908, and was then on March 27, 1909 of the age of 32 years and without children. The daughters named in said instrument, other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

Charlotte Lee Hartwell Chater died in Natick, in the County of Middlesex, Commonwealth of Massachusetts where she had been residing with her husband, Charles H. Chater, on the 3rd day of September, 1909, in childbirth, intestate, leaving the complainant her husband, Charles H. Chater, and one child, the complainant Charles Hartwell Chater, who was born on August 30, 1909,

thereafterwards, on the 15th day of November, 1909, the Probate Court of the County of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hartwell Chater, and issued letters to him, and he duly qualified as such and is now acting; and said Probate Court, on the 7th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the Territory of Hawaii, having its usual place of business in Honolulu, in said Territory.

57 II.

Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlottee Lee Hartwell Chater 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Alfred W. Carter, trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

HONOLULU, T. H., March 27, 1909.

Mr. Alfred W. Carter, City.

DEAR ALFRED: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally

among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

58 I also enclose for you to retain for Mabel Certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for her 250 shares which I formerly gave her is. I think it should be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

Very truly,

ALFRED S. HARTWELL.

This declaration of trust is the aforesaid "Exhibit A."

At the same time similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

HONOLULU, T. H., March 29, 1909.

Mr. Charles H. Chater, South Natick, Mass.

MY DEAR MR. CHATER: I have not been a good correspondent for I have had many cares and responsibilities resting upon me.

I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in

59 the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) "to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the

end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family."

I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15 and June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead here to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in which I should like to stay, it now seems to me, *which* I am east in the summers.

You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

Faithfully yours,

(S'g'd) ALFRED S. HARTWELL.

60 Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May and June, 1909, in the bank to the credit of Alfred S. Hartwell, who

subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the recipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

"BOSTON, MASS., April 15, 1909.

"Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares Hawaiian Sugar Co. stock, held by him as my trustee.

(Signed) CHARLOTTE L. H. CHATER".

Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

Alfred W. Carter endorsed and delivered the dvidend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

After the death of said Charlotte Lee Hartwell Chater the defendant, Alfred W. Carter, delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, endorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November, 29, 1909 issued to said Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the
61 defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, Trustee for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of that trust but receiving the same without consideration and as a gift from her father and not on any secret trust or understanding.

It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on the demand of said Alfred S. Hartwell and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent., paid the said Mabel R. Hartwell $20 for a fractional one-half share, and on July 2nd issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1552 shares in Mabel R. Hartwell's name, which 1552 shares are still standing in her name.

$877.50 was paid to A. W. Carter, Trustee, between September 3, 09 and November 29, 1909; $526.50 to Alfred S. Hartwell be- een November 29, 1909 and January 1, 1910, and the further n of $1170.00 to Alfred S. Hartwell between January 1, 1910 d May 18, 1910; $11,109.00 to the defendant, Mabel R. Hartwell between May 18, 1910 and January 1, 1913; and the further sum of $789.30 to the defendant, Mabel R. Hartwell, between January 1, 1913 and March 18, 1913, the day of filing of the bill, as dividends on the stock in suit, making a al of $14,472.30, of which $12,279.00 was paid between January 1910 and January 1, 1913, none of which has been paid to the mplainants or either of them although duly demanded, as has n the transfer to complainants of said stock.

Dividends at the rate of 30 cents per share have been declared the 15th day of April, of May and of June, 1913, and at the e of 20 cents per share on the 15th day of each month since ne, 1913, but no dividend on said 877 shares has been paid since rch 18, 1913 to said Mabel R. Hartwell, the dividends on said 7 shares having been retained by said Hawaiian Sugar Company.

The estate of said Charlotte Lee Hartwell Chater is not indebted any one; the known heirs are the complainants, Charles H. ater and Charles Hartwell Chater; and the said Charles H. ater consents that any interest which he may have in said stock said dividends may be accounted for and paid to himself as rdian for said Charles Hartwell Chater.

The market value of stock of the Hawaiian Sugar Company per res was on the 29th day of November, 1909, $36.25, on the 18th of May, 1910, $58.00, and on March 18, 1913, the day of the filing of this bill, $34.75 per share.

Dated, Honolulu, Hawaii, December 29, 1913 as of October 23, 1913.

CHARLES HARTWELL CHATER,
(A Minor) by His Next Friend and Guardian, Charles H. Chater;
CHARLES H. CHATER,
In His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), AND
CHARLES H. CHATER,
As Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,
By CASTLE & WITHINGTON,
Their Attorneys.

ALFRED W. CARTER,
Trustee;
ALFRED W. CARTER,
Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased;
MABEL R. HARTWELL, AND
THE HAWAIIAN SUGAR COMPANY,
A Corporation, Defendants,
By FREAR, PROSSER, ANDERSON & MARX,
Their Attorneys.

Endorsed: Original. No. 751. Supreme Court Territory of Hawaii. Charles Hartwell Chater, (a minor), by his next friend and guardian, Charles H. Chater et al., Complainants, vs. Alfred W. Carter, Trustee; et al., Defendants. Stipulation of Facts. Filed December 29, 1913, at 11:00 A. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for —— ——.

64 In the Supreme Court of the Territory of Hawaii (October, 1913, Term).

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Plaintiffs-Appellants,

VS.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Respondents-Appellees.

Bill in Equity.

Waiver of Costs Against Hawaiian Sugar Company, a Corporation.

Now come the plaintiffs, and waive any claim to costs in this action against the Hawaiian Sugar Company, a defendant; not hereby waiving the right to costs against any other defendant herein.

Dated, Honolulu, December 29, 1913.

(S'g'd) CASTLE & WITHINGTON,
Attorneys for Plaintiffs-Appellants.

Endorsed: Original. No. 751. Supreme Court Territory of Hawaii. (October, 1913, Term.) Charles Hartwell Chater, (a Minor), by his next friend and guardian, Charles H. Chater, Charles H. Chater, et al. Plaintiffs-Appellants, vs. Alfred W. Carter, Trustee, et al., Respondents-Appellees. Waiver of Costs against Hawaiian Sugar Co. Filed December 29, 1913, at 3:12 P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Plaintiffs-Appellants.

65 In the Supreme Court of the Territory of Hawaii, October Term, 1913.

CHARLES HARTWELL CHATER (A Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased,

vs.

ALFRED W. CARTER, Trustee, ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation.

Appeal from Circuit Judge, First Circuit.

Argued February 17, 18, 1914. Decided March 6, 1914.

Robertson, C. J., Perry and De Bolt, JJ.

Trusts—contingent interest—resulting trust—interest by implication.

H, on March 27, 1909, delivered to C a certificate of stock in a corporation made out in the name of C as trustee for L, a recently married daughter of H, together with a letter in which it was stated inter alia that "the trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to
66 change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family." The letter contained other directions with reference to other certificates of stock given at the same time either directly or in trust for other daughters. L gave birth to a son on August 30, 1909, and died on September 3, 1909. After the delivery of the letter and certificate to C the dividends on the stock were forwarded to L by H or C, receipts therefor being given by L to C as trustee. After the death of L, C paid the dividends to H and finally endorsed and delivered back to H the certificate of stock which thereupon was given by H to his daughter M. Held, that the gift of the stock to L was contingent upon her being alive on January 1, 1913;

that the gift lapsed upon the death of L and the trust resulted to H; that there was not an implied gift to L's son upon the death of his mother; and that the gift of the dividends was intended to be solely to L personally, was contingent upon her being alive at the time the direction to pay was to take effect, and lapsed by reason of her death before that time.

67 *Opinion of the Court by Robertson, C. J.*

This is an appeal from a decree dismissing a bill in equity for an accounting for certain shares of the capital stock of the Hawaiian Sugar Company, a corporation, and the dividends declared thereon since August 1909, with interest. In the court below the parties agreed upon the facts, their stipulation, as amended in this court, reading as follows:

"Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the Circuit Court of the First Circuit, Territory of Hawaii, on the 15th day of October, 1912. The defendant Alfred W. Carter was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the Supreme Court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the Supreme Court of Hawaii. He was the father of seven daughters all of whom except Charlotte Lee Hartwell Chater now survive, to-wit, the five named in the instrument dated March 27, 1909, attached to the complaint herein and marked 'Exhibit A,' namely: Charlotte Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell and Juliette Hartwell 'Lottie Lee,' named in said instrument Exhibit 'A,' being Charlotte Lee Hartwell Chater, and 'Mabel,' being Mabel R. Hartwell, and also Madeline Hartwell Judd and Edith Hartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to-wit, on July 15, 1908, and was then on March 27, 1909, of the age of 32 years and without children. The daughters named in said instrument, other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

Charlotte Lee Hartwell Chater died in Natick, in the County of Middlesex, Commonwealth of Massachusetts, where she had been residing with her husband, Charles H. Chater, on the 3rd day of September, 1909, in childbirth, intestate, leaving the complainants, her husband, Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909; thereafterwards, on the 15th day of November, 1909, the Probate Court of the County of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hart-

well Chater, and issued letters to him, and he duly qualified as such and is now acting; and said Probate Court, on the 17th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the Territory of Hawaii, having its usual place of business in Honolulu, in said Territory.

68 "Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Alfred W. Carter, Trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

"Honolulu, T. H., March 27, 1909.

"Mr. Alfred W. Carter, City.

"DEAR ALFRED: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

"The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

"I also enclose for you to retain for Mabel Certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

"I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

"I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for her 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

"Very truly,

"ALFRED S. HARTWELL.

"This declaration of trust is the aforesaid 'Exhibit A.'

69 "At the same time, similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

"On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

"Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

"HONOLULU, T. H., March 29, 1909.

"Mr. Charles H. Chater, South Natick, Mass.

"MY DEAR MR. CHATER: I have not been a good sorrespondent for I have had many cares and responsibilities resting upon me.

"I am simply writing to you now about a metter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years *shall* shall have no child living, in which case the trustee to hold the stock

paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.'

"I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15, and June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

"I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

"It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

70 "I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

"I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new Cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in which I should like to stay, it now seems to me, when I am east in the summers.

"You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

"Faithfully yours,

"(S'g'd) ALFRED S. HARTWELL.

"Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May and June,

1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

'BOSTON, MASS., April 15, 1909.

'Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares of Hawaiian Sugar Co. stock, held by him as my trustee.

'(Signed) CHARLOTTE L. H. CHATER.'

"Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

"Alfred W. Carter endorsed and delivered the dividend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

"After the death of said Charlotte Lee Hartwell Chater the defendant, Alfred W. Carter, delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, endorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November 29, 1909, issued to said Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, Trustee for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of
71 that trust but receiving the same without consideration and as a gift from her father and not on any secret trust or understanding.

"It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on demand of said Alfred S. Hartwell and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

"On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent., paid the said Mabel R. Hart-

well $20 for a fractional one-half share, and on July 2nd issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1552 shares in Mabel R. Hartwell's name, which 1552 shares are still standing in her name.

"$877.50 was paid to A. W. Carter, Trustee, between September 3, 1909 and November 29, 1909; $526.50 to Alfred S. Hartwell between November 29, 1909 and January 1, 1910, and the further sum of $1170.00 to Alfred S. Hartwell between January 1, 1910 and May 18, 1910; $11,109.00 to the defendant, Mabel R. Hartwell between May 18, 1910 and January 1, 1913; and the further sum of $789.30 to the defendant, Mabel R. Hartwell, between January 1, 1913 and March 18, 1913, the day of the filing of the bill, as dividends on the stock in suit, making a total of $14,472.30, of which $12,279.00 was paid between January 1, 1910 and January 1, 1913, none of which has been paid to the complainants or either of them although duly demanded, as has been the transfer to complainants of said stock.

"Dividends at the rate of 30 cents per share have been declared on the 15th day of April, of May and of June, 1913, and at the rate of 20 cents per share on the 15th day of each month since June, 1913, but no dividend on said 877 shares has been paid since March 18, 1913 to said Mabel R. Hartwell, the dividends on said 877 shares having been retained by said Hawaiian Sugar Company.

"The estate of said Charlotte Lee Hartwell Chater is not indebted to any one; the known heirs are the complainants, Charles H. Chater and Charles Hartwell Chater; and the said Charles H. Chater consents that any interest which he may have in said stock or said dividends may be accounted for and paid to himself as guardian for said Charles Hartwell Chater.

"The market value of stock of the Hawaiian Sugar Company per share was on the 29th day of November, 1909, $36.25, on the 18th day of May, 1910, $58.00, and on March 18, 1913, the day of the filing of this bill, $34.75 per share."

Counsel for the complainants contend that it is shown that there was a gift to a child recently married from her father which was either a settlement or an advancement, similar gifts having been made to other daughters at the same time; that the gift was complete and irrevocable upon the transfer and delivery of the certificate of stock issued to Carter as "trustee for Charlotte Lee
72 Hartwell Chater;" that the property having passed out of Mr. Hartwell it could return to him only by way of a resulting trust following the consideration or lack of consideration, but as in this case the advancement was supported by love and affection, a good consideration, the trust, following that consideration, should result to the daughter or her estate; that, being a completed gift, the burden is upon the respondents to show an intention that the title to the stock should revest in the donor; that where trusts are engrafted on an otherwise completed gift and any portion of the trust fails the resulting trust is to the donee; that the intent of the donor creating a trust inter vivos is to be ascertained and

followed as in the case of a will, and that technical rules of law are not allowed to override this intention; that so construed it is clear that the stock was given in trust for Mrs. Chater as the beneficiary, except as modified by the letter, and that Mr. Hartwell did not intend any beneficial interest for himself; that the words "if she shall then be living" refer to Mrs. Chater's enjoyment of the principal and should not be construed to affect the vesting of the gift so as to make it conditional; and that there was an implied gift to Charles Hartwell Chater on the death of his mother before January 1, 1913, he surviving at that time; also that the gift of the dividends was an immediate gift, free of any contingency, which passed to the administrator.

Counsel for the respondents emphasize the facts that the payment of the dividends to Mrs. Chater was postponed until a time posterior to the expected birth of the child, and that there was no express provision for the child. The reason for this, it is urged, was distrust of Mr. Chater on the part of Mr. Hartwell and the latter's intention that the former was not to share in the trust fund either directly or indirectly as guardian of the child. It is said that Mr. Hart-
73 well undoubtedly contemplated the birth of the child and the possibility that Mrs. Chater might die in child-birth, she being 32 years of age at the time. And it is pointed out that the expressed desire of the donor was that the stock should remain in his family. Further, it is argued that "Judge Hartwell thought that if Mrs. Chater survived the birth of the child in the autumn and continued to live for the following few weeks until January 1, he could reasonably count on her living a considerable period longer. He took the arbitrary period of three years as a reasonable time within which Mr. Chater would fully and finally show his quality as a husband and father, and within which also would be determined whether Mrs. Chater, who was 32 or 33 years old, would have any more children and would survive their birth, and whether the children would survive the first perilous stages of infancy. Judge Hartwell therefore provided that the dividends should be paid to Mrs. Chater during the three year period beginning January 1, 1910, and that if at the end of that period she should be living and should have a child, the principal of the trust fund should be transferred to her or held in trust for her benefit as she might in writing request, or if she should be living and have no child the trustee should hold the stock giving Mrs. Chater the income for life, and at her death transferring the principal to the then surviving sisters and children;" that "It is immaterial whether Judge Hartwell ever thought of the resulting trust to himself. If he intended that the trust fund should not go to Mr. Charter or the child there is no one to take it and a resulting trust arises as a matter of necessity since the trustee cannot hold for himself;" that the gift of the stock at the end of three years was expressly contingent on the survival of Mrs. Chater at that time, for both the clause "if she shall then be living" and the clause "as she may in writing request" must be stricken out if the gift of principal is to be held vested and
74 not conditional; that the trustee, at the end of the three year period, was subject to three alternative instructions each of

which necessarily contemplated the survival of Mrs. Chater at that time; that the trust having failed by reason of the death of the beneficiary, there being no gift over that could take effect the trust resulted to the donor; and that the gift of the dividends, being payable in the future, was contingent and lapsed on the death of Mrs. Chater. Respective counsel concede that the object of the court must be to ascertain and give effect to the intention of the donor.

The complainants base their claim to the shares of stock upon three principal contentions: (1) That the gift to Mrs. Chater was a vested one subject to be divested with a gift over to the sisters and their children only upon an event which did not occur; (2) that if there was a resulting trust it resulted to Mrs. Chater's estate; and (3) there was an implied gift to the child in the events which did happen.

The argument that the terms of the letter to Carter, the letter to Chater, the wording of the certificate of stock, and that of the receipts for the dividends, and the surrounding circumstances, all combine to indicate an intention in the mind of Mr. Hartwell to part with the stock absolutely, and to negative the possibility of his having contemplated a resulting trust in himself under the events which occurred is not convincing. Why the payment of the dividends was postponed and why no provision was made for the expected child is left to conjecture unless the theory of counsel for the respondents is to be accepted. But whatever the reason, the fact is that the gift was made in trust and the terms of the trust are to be found in the letter to Carer. That letter is not to be separated from the certificate
75 of stock with which it was enclosed but is to be taken as though its terms were written into the certificate. A study of that part of the letter which defines the trust for Mrs. Chater leads irresistibly to the conclusion that the gift was made contingent upon her being alive on January 1, 1913. This is the plain meaning of the words used and is the only inference which reasonably can be drawn from phrases "if she shall then be living," and "as she may in writing request," and the qualifying clause "unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime." True, as contended, an effectual gift may be made through a trustee, but here there was not an absolute or immediate gift of the stock—the trustee was to hold it for a specified time and then to dispose of it according to the direction of Mrs. Chater, she being alive at that time. The terms of the trust are embodied in an informal letter but the fact that the same letter contained different provisions for other daughters of the donor is potent evidence that the language of the provision for Mrs. Chater was used advisedly. It is argued that the word "if" does not always denote a condition or contingency, and cases are cited applying the rule that in a will the word "if" may be construed as "when" in order to advance the apparent intent of the testator. 21 Cyc. 1725. The cases cited are not in point. There is no reason for supposing, in the case at bar, that construing "if" in the phrase "if she shall then be living" as "when" would accord with the intent of the donor. The word "when" would

be an obvious misfit in that phrase, and had it been used it would doubtless have been necessary to construe it as "if" to conform to the intent as shown by the context. In short, we have found no good reason why the language of the letter should not be given its plain and ordinary meaning.

76 In support of their contention on the second ground counsel for the complainants invoke the well established doctrine that where one buys property in the name of another and pays the consideration money the property will generally be held by the grantee in trust for the one who paid the consideration, but that where the conveyance is taken in the name of the wife or child of the purchaser the presumption is in favor of a gift or advancement and against a resulting trust. We are of the opinion that the doctrine has no application to a case such as this. In the classification of resulting trusts as made by text writers the case at bar would be put in another class. "Resulting trusts may arise in several ways, and may be conveniently divided into the following classes: (1) where a purchaser pays the purchase money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared; or are only partially declared, or fail; and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially." Bispham's Principles of Equity (3d ed.), 118. See also 1 Perry on Trusts, Sec. 125. "All true resulting trusts may be reduced to two general types: 1. Where there is a gift, to A, but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. In order that a case of this kind may arise, there must be a true gift so far as the immediate transferee A is concerned, and no valid complete trust must be declared in favor of A or any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result

77 to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. 2. The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B." Pomeroy's Equity Jurisprudence (3d ed.) Sec. 1031. The case at bar falls within Bispham's third division and Pomeroy's first. The latter author, sub-dividing his first type, says, at section 1034, "A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the quitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the part of it undisposed of in the other, will, in general, result to the grantor, or to the heirs or representatives of the testator." And in Hill on Trustees (4th Am. ed.), 179, it is said that "There is no equitable principle more firmly established than that, where a voluntary disposi-

tion of property by deed or will is made to a person as trustee, and the trust is not declared at all; or is ineffectually declared; or does not extend to the whole interest given to the trustee; or it fails either wholly or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself or for his heir at law or next of kin, according to the nature of the estate." See King v. Mitchell, 8 Pet. 326; Bond v. Moore, 90 N. C. 239; Skellenger v. Skellenger, 32 N. J. E. 659. We hold that there was no resulting trust to Mrs. Chater's heirs, but that the trust resulted to Mr. Hartwell unless there was an implied gift to Mrs. Chater's child.

78 In connection with the third ground, counsel for the complainants urge that the clause "unless at the end of three years she shall have no child living" necessarily leads to the conclusion that if there was a child living it took. The doctrine of gifts by implication is well established in the law of wills, and counsel argue that as in the interpretation of deeds the object is equally to ascertain the intention of the parties (Simerson v. Simerson, 20 Haw. 57; Nahaolelua v. Heen, id. 372) the rule is applicable to deeds and to instruments creating trusts such as the one in hand. Elphinstone, in his Interpretation of Deeds (p. 286) says, "An estate by implication of law has place only by way of use, either by assurances operating under the statute or through the medium of a conveyance to serve the uses, and in devises. By the rules of the common law applicable to deeds, no intention will be presumed unless it is expressed; and consequently no estate will arise unless there be a limitation to pass that estate." See Dudley v. Mallery, 4 Ga. 52, 64. "Estates by implication are not favored. * * * Courts go much further in stretching the language of a will than of a deed in order to give effect to the intention." Kellett v. Sumner, 15 Haw. 76, 97. Assuming that the rule is applicable to conveyances creating trusts operating inter vivos, we think that the intention to make a gift by implication would be less readily found in such an instrument than in a will where it would be supported by the presumption against intestacy. And in construing wills, even, the probability that the testator intended to make the devise or bequest implied must be so strong that a contrary intention could not reasonably be imputed to him. 50 Cyc. 1390; 1 Underhill on Wills, Sec. 463. "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which
79 is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." Metcalf v. Framingham Parish, 128 Mass. 370, 374, quoted with approval in Robison v. Portland Orphan Asylum, 123 U. S. 702, 707. Where a partial or incomplete trust is created by an instrument other than a will the donor being alive is in a position to make supplementary provisions to take effect during his lifetime, or by will to take effect upon his death. It appears here that the birth of a child to the primary object of his bounty was anticipated by the donor and evidently was in his mind when he penned the terms of

the trust. The language of the trust instrument must be read with a view to the circumstances under which it was written. The letter was written with the fact in mind that a child was actually in gestation with the probability that in due course it would come into being. Yet, although contingent provision was made in the same instrument for the children of other daughters, there was no provision for any child of Mrs. Chater. The natural inference to be drawn is that provision for the expected child was intentionally omitted. Under these circumstances the court is not permitted to find that there was a gift by implication.

The contention as to the dividends is that the provision was in terms a present gift; that it was a completed gift to Mrs. Chater—not a mere direction to pay at a future time; that it vested immediately; and that the right to the dividends for three years passed to Mrs. Chater's administrator. Counsel for the respondents think that because the trust as to the shares failed by reason of the death of Mrs. Chater, the gift of the dividends fell with it, and that it was
80 improbable that Mr. Hartwell intended that the income should be paid to Mrs. Chater's administrator after her death and after the gift of the principal had lapsed. No authority exactly in point has been found. Most of the cases cited in the briefs are of testamentary dispositions. The provision contained in the letter was neither for a legacy nor an annuity. Here again it is a matter of ascertaining from the trust instrument and the surrounding circumstances the intention of the donor. It is clear that Mrs. Chater was the chief object of the bounty. If she had lived and had a child at the end of the three year period the shares with the right to the dividends thereon would have been hers absolutely. There was no provision for the child whose birth was expected, nor for any children that might have been born to Mrs. Chater after January 1, 1913, had she lived. The direction as to the dividends was in general terms and no words of limitation were used. Payment was not to begin at once. We do not agree with the circuit judge that the failure to make the dividends payable at once was an oversight, nor do we think that the fact that the dividends for the months from April to August were sent to Mrs. Chater affects the construction to be given the terms of the letter. There is an absence of any satisfactory evidence of an intention that in the event of the death of Mrs. Chater the dividends should be paid to her estate. In case of doubt the interest should be held to be vested rather than contingent but we think upon the whole that it sufficiently appears that the gift was intended to be solely to Mrs. Chater personally, was continent upon her being alive at the time the direction to pay was to take effect, and lapsed by reason of her death before that time.

81 The decree appealed from is affirmed.

D. L. Withington and A. L. Castle (Castle & Withington on the brief) for complainants.

R. B. Anderson (Frear, Prosser, Anderson & Marx on the brief) for respondents.

A. G. M. ROBERTSON.
ANTONIO PERRY.
J. T. DE BOLT.

Endorsed: No. 751. Supreme Court Territory of Hawaii. October Term, 1913. Charles Hartwell Chater, a minor, et al. v. Alfred W. Carter, Trustee, et al. Opinion. Filed March 6, 1914, at 11:55 A. M. J. A. Thompson, Clerk.

52 In the Supreme Court of the Territory of Hawaii.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

vs.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a Corporation, Defendants.

Appeal from First Circuit Court.

Decision on Appeal.

In the above entitled cause, pursuant to the opinion of the above entitled court filed March 6, 1914, the decree appealed from is affirmed.

Dated, Honolulu, March 17, 1914.
By the Court:

J. A. THOMPSON,
(S.) *Clerk Supreme Court.*

Endorsed: No. 751 Supreme Court Territory of Hawaii. Charles Hartwell Chater (a minor), et al., vs. Alfred W. Carter, Trustee, et al. Decision on appeal. Filed March 17, 1914, at 2:50 P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu, Attorneys for —.

83 In the Supreme Court of the Territory of Hawaii, October Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation, Defendants.

Appeal from First Circuit Court.

Findings of Fact.

The facts found in the stipulation of facts agreed upon by the parties as amended in this court, and also set forth in the opinion of the court, are found to be true and said amended stipulation incorporated herewith by reference.

Dated, Honolulu, T. H., May 18, 1914.

By the Court:

[SEAL.]

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

84 [Endorsed:] No. 751. Supreme Court, Territory of Hawaii. In Equity. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, trustee, et al., defendants. Findings of Fact. Filed May 18, 1914, at 3:15 P. M. J. A. Thompson, clerk. Castle & Withington, attorneys for complainants.

85 In the Supreme Court of the Territory of Hawaii, October Term, 1913.

In Equity.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation, Defendants.

Appeal from First Circuit Court.

Appeal.

The above named complainants, conceiving themselves aggrieved by the decision and decree made and entered on the 17th day of March, 1914, in the above entitled proceedings, do hereby appeal from said decision and decree to the Supreme Court of the United States; and pray that this appeal may be allowed for the reasons specified in the assignment of errors, and that a transcript of the record and proceedings, and papers upon which said decision and decree was made, duly authenticated, excepting that, instead of the evidence at large, a statement of the facts of the case shall be certified by this court, may be sent to the Supreme Court of the United States.

Dated, Honolulu, Territory of Hawaii, May 18, A. D. 1914.

(S'g'd) CASTLE & WITHINGTON,

Attorneys for Charles Hartwell Chater (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H.

86 *Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants.*

And now, to wit, on the 18th day of May, 1914, it is ordered that the appeal be allowed as prayed for.

[SEAL.] (S'g'd) A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the within and foregoing appeal and citation, and the receipt of a copy thereof, admitted this 18th day of May, 1914.

(S'g'd) FREAR, PROSSER, ANDERSON & MARX,

Attorneys for Defendants.

Endorsed: No. 751. Supreme Court, Territory of Hawaii. In Equity. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, Trustee, et al., Defendants. Appeal. Filed May 18, 1914, at 3:15 P. M. J. A. Thompson, clerk. Castle & Withington, attorneys for complainants.

87 In the Supreme Court of the United States.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Appellants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation.

Appeal from the Supreme Court of the Territory of Hawaii.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, deceased, are appellants,

88 and you, Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a corporation, are appellees, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable A. G. M. Robertson, Chief Justice of the Supreme Court of the Territory of Hawaii, this 18th day of May, 1914, in the year of our Lord one thousand nine hundred fourteen.

[SEAL.] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

89 [Endorsed:] No. 751. Supreme Court of the United States. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., appellants, vs. Alfred W. Carter, trustee, et al. Citation on Appeal. Filed May 18, 1914, at 3:15 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Castle & Withington, attorneys for appellants.

90 In the Supreme Court of the United States.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Appellants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, deceased, appellants in the above entitled action, and say that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, tow-wit:

1. That the said court erred in overruling the complainants' appeal from the decision and decree of the Judge of the Circuit Court of the First Judicial Circuit dismissing their bill, and in affirming said decree.

2. That the said court erred in holding, upon the agreed
91 facts in this case, that a trust resulted to Alfred S. Hartwell in the stock of the Hawaiian Sugar Company and the dividends thereon, the subject of this action.

3. That the said court erred in holding that there was a resulting trust to Alfred S. Hartwell in the dividends on said stock to January 1, 1913.

4. That the said court erred in holding that there was no intention on the part of Alfred S. Hartwell to part with the stock absolutely, and that he contemplated a resulting trust to himself upon the events which have occurred.

5. That the said court erred in holding that the said Alfred S. Hartwell intended to postpone the payment of dividends to Charlotte Lee Hartwell Chater until the first day of January, 1910, and that payment was not to begin at once; that the failure in the let-

ter to Alfred W. Carter to expressly make the dividends payable at once was not an oversight; that the letter to Mr. Chater and the sending of the dividends to Mrs. Chater do not affect the construction of this letter; and that the gift of dividends was intended to be solely to Mrs. Chater personally, contingent upon her being alive on the first day of January, 1910, and lapsed by reason of her death before that time.

6. The said court errtd in holding that Alfred S. Hartwell did not intend that the entire beneficial interest in said stock and dividends should pass to his daughter, Charlotte Lee Hartwell Chater, excepting in the one event named, viz.: that she should have no child living on the first day of January, 1913.

7. That the said court erred in holding in this case, where "it is clear that Mrs. Chater was the chief object of the bounty," where a completed transfer of the stock was made to a trustee for a daughter, and where the dividends on the stock were given to her
92 unconditionally, that, in a contingency unprovided for, a trust would result to the donor rather than to the daughter, "the chief object of the gift," in the absence of anything in the trust or the surrounding circumstances to indicate an intention that it should result to the donor.

8. That the said court erred in holding, upon the facts set forth in the last assignment of error, that where there is an ultimate disposition to sisters and their children, but in an event personal to the chief object of the trust, and no intention apparent that the donor is to take in any contingency, a trust would result to the donor rather than to the chief object of the gift.

9. That the said court erred in holding, upon the facts set forth in the last two assignments of error, that the resulting trust did not follow the consideration of love and affection and result to the daughter the chief object of the gift, particularly in this case, where the gift is in the nature of an apportionment amongst children of a father's estate.

10. That the said court erred in holding, upon the facts set forth in the last three assignments of error, that the directions under which the alleged resulting trust to the donor is claimed to have arisen are not mere directions to the trustee in the administration of the trust, and in holding them to be conditions precedent upon which its execution depends.

11. That the said court erred in holding that in case the entire interest, excepting in the one contingency named, did not pass to Mrs. Chater, there is no implied gift to Charles Hartwell Chater.

Dated, Honolulu, T. H., May 18, 1914.

CASTLE & WITHINGTON,
Attorneys for Appellants.

93 [Endorsed:] No. 751. Supreme Court of the United States. Charles Hartwell Chater (a minor), by his next friend and guardian Charles H. Chater, et al., Appellants, vs. Alfred W. Carter, Trustee, et al. Assignment of Errors. Filed May 18, 1914 at 3:15 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Castle & Withington, Attorneys for Appellants.

94 In the Supreme Court of the United States.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Appellants.

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and The Hawaiian Sugar Company, a Corporation.

Appeal from the Supreme Court of the Territory of Hawaii.

Bond on Appeal.

Know all men by these presents: That we, Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor); and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, deceased, and H. G. Winkley and A. N. Campbell, both of Honolulu, in the City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto the above named Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased; Mabel R. Hartwell and The Hawaiian Sugar Company, a corporation, in the full and just sum of Five Hundred Dollars, to be paid to the said Alfred W. Carter, Trustee; Alfred W. Carter, Executor of the Last Will and testa-
95 ment of Alfred S. Hartwell, deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a corporation, their attorneys, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of May, 1914.

Whereas, the above named Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor): and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, deceased, have prosecuted an appeal to the Supreme Court of the United States to reverse the decision and decree rendered in the above entitled proceeding by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such that if the above named Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater; Charles H. Chater, in his own right and as guardian of said Charles Hartwell Chater (a minor); and Charles H. Chater, as Administrator of the Estate of Charlotte

Lee Hartwell Chater, deceased, shall prosecute said appeal to effect and answer all damages and costs, if they shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

CHARLES HARTWELL CHATER
(a Minor), by His Next Friend and Guardian, Charles H. Chater;
CHARLES H. CHATER,
In His Own Right and as Guardian of said Charles Hartwell Chater (a Minor); and
CHARLES H. CHATER,
As Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased,
(S'g'd) By CASTLE & WITHINGTON,
Their Attorneys.
" H. G. WINKLEY, *Surety.*
" A. N. CAMPBELL, *Surety.*

96 Approved by:
(S'g'd) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.
[SEAL.]

Endorsed: No. 751. Supreme Court of the United States. Charles Hartwell Chater (a minor), by his next friend and guardian Charles H. Chater, et al., Appellants, vs. Alfred W. Carter, Trustee, et al. Bond on Appeal. Filed May 18, 1914, at 3:15 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Castle & Withington Attorneys for Appellants.

97 In the Supreme Court of the Territory of Hawaii.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and the Hawaiian Sugar Company, a orporation, Defendants.

Precipe Designating Parts of the Record to be Included in the Transcript.

To J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the above entitled cause, which said transcript is to be filed in the Supreme

Court of the United States pursuant to an appeal taken and allowed in said cause, and to include in such transcript of record the following papers and exhibits, to wit:

1. Bill of Complaint, together with and annexed thereto as an exhibit thereof, Exhibit "A," copy of letter from Alfred S. Hartwell to Alfred W. Carter dated March 27, 1909.
2. Chambers Summons, with Return of Service of same.
3. Answer of Hawaiian Sugar Company.
4. Answer of Mabel R. Hartwell.
5. Amended Answer of Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, deceased.

98 6. Amended Answer of Alfred W. Carter, Trustee.

7. Decision of Hon. Lyle A. Dickey dated November 4, 1913.
8. Decree dated November 4, 1913.
9. Appeal of Complainants dated November 8, 1913.
10. Motion by Complainants for Admission of Newly Discovered Evidence, with Notice of Motion and Affidavit of D. L. Withington attached thereto, with letter of Alfred S. Hartwell to Charles H. Chater dated March 29, 1909, attached to said Affidavit as Exhibit "A."
11. Clerk's Minutes on said Motion for the Admission of Newly Discovered Evidence.
12. Amended Stipulation of Facts.
13. Waiver of Costs against Hawaiian Sugar Company.
14. Opinion of the Supreme Court of the Territory of Hawaii rendered March 6, 1914.
15. Decision of the Supreme Court of Hawaii dated March 17, 1914.
16. Findings of Fact, dated May 18, 1914.
17. Appeal by Complainants to the Supreme Court of the United States, together with and annexed thereto Order Allowing Appeal and Acknowledgment of Service of Appeal and Citation on Appeal.
18. Assignment of Errors.
19. Citation on Appeal.
20. Bond on Appeal.

Dated, Honolulu, T. H., May 18, 1914.

(Signed) CASTLE & WITHINGTON,
Attorneys for Complainants.

Endorsed: No. 751. Supreme Court Territory of Hawaii. Charles Hartwell Chater (a minor), by his next friend and guardian, Charles H. Chater, et al., Complainants, vs. Alfred W. Carter, Trustee, Alfred W. Carter, Executor; Mabel R. Hartwell; & Hawaiian Sugar Co., Defendants. Præcipe Designating Part of the Record to be included in the Transcript. Filed May 29, 1914, at 4:10 P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Complainants.

99 In the Supreme Court of the Territory of Hawaii. October Term, 1913.

CHARLES HARTWELL CHATER (a Minor), by His Next Friend and Guardian, Charles H. Chater; Charles H. Chater, in His Own Right and as Guardian of said Charles Hartwell Chater (a Minor), and Charles H. Chater, as Administrator of the Estate of Charlotte Lee Hartwell Chater, Deceased, Complainants,

vs.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel H. Hartwell, and the Hawaiian Sugar Company, a Corporation, Respondents.

Appeal from Circuit Judge, First Circuit.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 82 inclusive, pages 85 to 86 inclusive, and pages 94 to 96 inclusive, contain, full, true and correct copies of the pleadings, records, entries and decision in the above entitled cause numbered 751 in the Supreme Court of the Territory of Hawaii, and on proceedings on appeal in the Supreme Court of the United States as full, true and correct and complete as the same are on file and of record in my office as clerk of said Supreme Court of the Territory of Hawaii in said cause, and herewith transmitted to the said Supreme Court of the United States in pursuance of the præcipe of the attorneys for the appellants attached hereto, being pages from 97 to 98 inclusive of the foregoing transcript.

I do further certify that the Original Findings of Fact, being pages 83 to 84, the Original Citation on Appeal, being pages 87 to 89 and the Original Assignment of Errors being pages 90 to 93 are hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at my office in Honolulu, City and County of Honolulu, this 16th day of June, A. D. 1914.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 24,288. Hawaii Territory Supreme Court. Term No. 544. Charles Hartwell Chater, a minor, by his next friend and guardian, Charles H. Chater, et al., appellants, vs. Alfred W. Carter, trustee; Alfred D. Carter, executor of the last will and testament of Alfred S. Hartwell, deceased, Mabel R. Hartwell, and Hawaiian Sugar Company. Filed July 1st, 1914. File No. 24,288.

Office Supreme Court, U. S.
FILED
MAR 8 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 544.

CHARLES HARTWELL CHATER (A MINOR), BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER; CHARLES H. CHATER, IN HIS OWN RIGHT AND AS GUARDIAN OF SAID CHARLES HARTWELL CHATER (A MINOR), AND CHARLES H. CHATER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE LEE HARTWELL CHATER, DECEASED, APPELLANTS,

vs.

ALFRED W. CARTER, TRUSTEE; ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED; MABEL R. HARTWELL, AND THE HAWAIIAN SUGAR COMPANY, A CORPORATION.

MOTION TO ADVANCE AND JOINT REQUEST TO SET FOR A DAY CERTAIN.

DAVID L. WITHINGTON,
Attorney for Appellants.
ROBBINS B. ANDERSON,
Attorney for Alfred W. Carter, Trustee, et al.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 544.

CHARLES HARTWELL CHATER (A MINOR), BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER; CHARLES H. CHATER, IN HIS OWN RIGHT AND AS GUARDIAN OF SAID CHARLES HARTWELL CHATER (A MINOR), AND CHARLES H. CHATER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE LEE HARTWELL CHATER, DECEASED, APPELLANTS,

vs.

ALFRED W. CARTER, TRUSTEE; ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED; MABEL R. HARTWELL, AND THE HAWAIIAN SUGAR COMPANY, A CORPORATION.

MOTION TO ADVANCE AND JOINT REQUEST TO SET FOR A DAY CERTAIN.

To the Honorable Supreme Court of the United States:

The undersigned request that the above-entitled cause be set for a day certain, to wit, on or about the date at which the case of Kapiolani Estate, Limited, *vs.* Mary H. Atcherley,

Lyle A. Dickey, and E. M. Watson may be restored to the calendar by the order of this court.

This request is based on the fact that the said cases are the only cases from the Supreme Court of the Territory of Hawaii likely to be reached this term, and that it is a great hardship on counsel for appellants in both cases to have the same reached at different times, requiring two trips instead of one.

Dated Honolulu, January 12, 1915.

(Sig.) DAVID L. WITHINGTON,
Attorney for Appellants.

(Sig.) ROBBINS B. ANDERSON,
Attorney for Alfred W. Carter, Trustee, et al.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 544.

CHARLES HARTWELL CHATER, A MINOR, BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER, ET AL., APPELLANTS,

vs.

ALFRED W. CARTER, TRUSTEE; ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED; MABEL R. HARTWELL, AND HAWAIIAN SUGAR COMPANY.

REPLY BRIEF.

On page 4 of the brief for the appellees it is stated that "Judge Hartwell did not make a free, absolute gift; merely postponed the possession of the principal."

We believe that he did make such a gift, and one gift only, and that was to Mrs. Chater, subject only to the trust.

This is shown by the following:

THE TRANSFERENCE OF THE STOCK AND THE ISSUANCE OF THE NEW CERTIFICATE IN THE NAME OF "ALFRED W. CARTER, TRUSTEE FOR CHARLOTTE LEE HARTWELL CHATER," WAS A COMPLETE AND IRREVOCABLE GIFT, IMMEDIATE IN ITS NATURE, WHICH SEPARATED THE STOCK FROM THE DONOR'S ESTATE AND VESTED THE LEGAL ESTATE IN THE TRUSTEE, AND THE ENTIRE EQUITABLE INTEREST IN THE CESTUI QUE TRUST.

Ellis vs. Newell, 120 Ia., 71; 94 N. W., 463.
Snowden vs. Crown Cork, etc., Co., 114 Md., 650; 80 Atl., 510; Ann. Cas., 1912.
Talbot vs. Talbot, 32 R. I., 72; 78 Atl., 5351; Ann. Cas., 1912, c. 1231.
Gerrish vs. New Bedford Inst. for Sav., 128 Mass., 159; 35 Am. Rep., 365.
Bath Savings Institution vs. Hathorn, 88 Me., 122; 32 L. R. A., 377.
Larimer vs. Beardsley, 130 Ia., 706; 107 N. W., 935.
King vs. Smith, 110 Fed., 95; 54 L. R. A., 708.
Kimble vs. White, 50 N. J. Eq., 28; 24 Atl., 400, 401; citing Jarman on Wills.
Harris vs. Judd, 3 Haw., 421, 437.
Stone vs. Hackett, 12 Gray, 227, 230, 231.
McCandless vs. Castle, 19 Haw., 515.

IT IS A GIFT FROM A FATHER TO A RECENTLY-MARRIED CHILD IN THE NATURE OF A SETTLEMENT OR ADVANCEMENT, AND IS A PART OF AN APPORTIONMENT OF SO MUCH OF HIS ESTATE TO CERTAIN OF HIS DAUGHTERS.

(*a*) "I have paid off the heavy indebtedness which had been burdening me for several years and *am now dividing the shares in the Hawaiian sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more*" (p. 36).

(*b*) *"I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy,* future arrangements for the others to await contingencies, and I am in my will giving my homestead here to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome" (p. 37).

(*c*) "I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please" (p. 35).

The trust for Juliette and Dorothy, while appearing to be contingent, is in fact an absolute gift of all legal and equitable interest (p. 35).

(*d*) Although there is no direction to pay the dividends until the first of January, 1910, the donor understood the transfer to constitute a completed gift, which entitled the beneficiary to the dividends from the time of transfer.

(1) "I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go East in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for *the entire $250.50 coming to her,* less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will" (p. 37).

(2) "Alfred W. Carter endorsed and deposited the

dividend warrants on said 585 shares for the months of April, May and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

"'BOSTON, MASS., April 15, 1909.

"'Received of Alfred E. Carter, trustee, per Charles Brewer & Co., one hundred seventy-five and 50/00 ($175.50) dollars, April *dividends on 585 shares Hawaiian Sugar Co. stock, held by him as my trustee.*

(Signed) CHARLOTTE L. H. CHATER.'

"Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater."

(*e*) Being an advancement or settlement on a child by a father where the good consideration of love and affection is presumed, a presumption will be indulged that the donor intended it to be a complete gift.

(*f*) Judge Hartwell understood that he was divesting himself of all interest in the stock and that it had passed to Charlotte Lee Hartwell Chater and the other members of "my family" named, including any child of Charlotte Lee Hartwell Chater who might be born and alive on January 1, 1913, only excluding Mr. Chater.

THE TRUST, BEING ENGRAFTED ON AN EXECUTED AND COMPLETED GIFT MADE TO A CHILD AS AN APPORTIONMENT OF THE DONOR'S ESTATE UPON A CONSIDERATION OF LOVE AND AFFECTION, CAN ONLY BE DEFEATED UPON A CONTINGENCY WHICH ARISES UNDER THE TRUST, AND NO SUCH CONTINGENCY AROSE.

That the trust was intended to be engrafted on an already executed and completed gift of the equitable estate is shown—

(*a*) By the receipt drawn by him and sent undoubtedly by the first steamer and enclosed in the notice of the gift, in which he recites that it is for "April dividends on 585 shares Hawaiian Sugar Company stock held by him (Alfred W. Carter, trustee) as my trustee," whereas the trust only provided that the trustee should "cause the dividends to be paid to her during the three years from January 1st next," nine months later.

(*b*) By the donor's declaration of his intention in engrafting the trust:

> "My object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family,"

from which it is clear that he included in his family any child living January 1, 1913, and only excluded Mr. Chater, and for this reason provided that in case Charlotte Lee Hartwell Chater, then thirty-two years of age and without children, should not have a child living at a period fixed by him about four years later, that an interest should arise in his other daughters and their children in order that the stock should go to members of his family rather than to Mr. Chater, assuming that if there was a child living the mother would transmit the stock to the child, whom the donor included among the members of his family.

The word "family" is shown by the context to be used in its secondary meaning, as those descended from one common progenitor.

Estate of Bennett, 134 Cal., 320; 66 Pac., 370.
Dodge vs. Boston & Providence R. R. Co., 154 Mass., 299; 28 N. E., 243; 13 L. R. A., 318.

(*c*) Again the presumption is that Judge Hartwell did not intend to disinherit a grandchild.

McCaffrey vs. Manogue, 196 U. S., 563.
Afong vs. Afong, 5 Hawaii, 191.

AN APPLICATION OF THE THEORIES OF APPELLANTS AND APPELLEES SUSTAIN APPELLANTS' CONTENTION.

Our theory provides for every contingency, the trust being engrafted upon a completed and executed gift.

The appellees claim that one contingency, namely, the death of Lottie Lee before January 1, 1913, is unprovided for.

Judge Hartwell contemplated:

(*a*) That he had apportioned his estate, giving Lottie Lee these 585 shares in trust.

(*b*) That Lottie Lee might not be living at the end of the three years from January 1st.

(*c*) That Lottie Lee would have a child, but at the end of three years the child might not be living.

(d) That he had provided for every contingency in a way that the shares would "remain in my family."

(*e*) That none of the shares were going to himself in any contingency.

There are two suppositions which fit this:

1. That the donor understood that he had transferred the entire equitable interest to Lottie Lee, except in a single case which has not arisen and can, therefore, be disregarded.

2. That he understood that on the death of Lottie Lee, leaving a child, the child would take it if it survived to January 1, 1913.

There is a clear gift of the dividends until January 1, 1914 (including the interim), the period selected by the donor to ascertain whether Mrs. Chater would or would not have a child living, which would determine whether the other members of his family should have any interest in the stock.

Burnham vs. Aiken, 6 N. H., 306, 328.
Pearson vs. Chase, Ex., 10 R. I., 455.

If Mrs. Chater has no child living at the end of the three years, the sisters and their children would have an interest in the stock. This interest is cut off by appellees' theory in case Mrs. Chater dies before January 1, 1913. No reason for this distinction can be pointed out.

Appellants' theory is in entire accord with the purpose of the donor, with his directions, with the letter to Chater and the receipts, and covers every contingency. Appellees' theory is inconsistent with the purpose of the donor to benefit his daughter, and, in a certain contingency, his family; and ignores the importance of Charles Hartwell Chater as an object of the gift, either directly or indirectly.

It is also inconsistent with two well-settled rules: First, that where there is an ultimate disposition as here to the sisters and their children of property the inclination of the court is to assume that it takes effect in a contingency not in terms mentioned, but which must have been in the giver's mind. The most familiar instance is where property is given over if the widow remarries; there the devise over-

takes effect on death as well as remarriage. Jarman, chapter 50, discusses numerous cases coming under this rule. Second, in the construction of instruments relative words are generally deemed to refer to the nearest antecedent. "In which case" refers to the case of Mrs. Chater having no child living on January 1, 1913, and not to her being alive.

2 *Parsons, Contracts,* 513.
2 *Dev. on Deeds,* sec. 843.
Baring vs. Christie, 5 East., 398.
Bold vs. Molineux, 1 Dyer, 14*b*.

THE APPELLEES' ONLY CLAIM RESTS ON A RESULTING TRUST. SUCH A TRUST HAS FOR ITS SOURCE AND UNDERLYING PRINCIPLE THE EQUITABLE THEORY OF CONSIDERATION AND "REVERTS TO THE SOURCE AND ORIGIN OF THE CONSIDERATION WHATEVER MAY BE ITS CHARACTER AND NATURE."

Pomeroy's Eq. Jur., section 1031.
Kaiawahakena vs. Makapuu, 6 Haw., 188, 190.
Jarrett vs. Manini, 2 Haw., 667, 673.
Smithsonian Institution vs. Meech, 169 U. S., 398.
Jackson vs. Jackson, 91 U. S., 122.
Co. Litt., 23 (a).

The good consideration of love and affection was furnished by the *cestui que trust.*

Being a completed and executed gift, no consideration is necessary, and the resulting trust, where a trust is engrafted upon a completed gift in case of failure, is to the donee and not the donor.

On page 7 of appellees' brief it is claimed there was a postponement of the payment of dividends under the trust for the period to January 1, 1910, and on page 9 that there was a separate gift of the dividends for this period. Nothing in the facts shows such a postponement, and the dividends were paid and receipted for under the trust and

there was no separate gift of them. The two letters must be read together, and also should be read in connection with the issuance of the receipt and the stock to Mr. Carter as trustee for Mrs. Chater, which stock carried with it the dividends at once.

At the bottom of page 10 and the top of page 11 the appellees say—

> "We submit that there was no possible reason for postponing the payment of the dividends to Mrs. Chater until the following January 1 if she were surely and unconditionally to have the dividends for the next three years."

This argument works the other way. Judge Hartwell never dreamed he was postponing the dividends.

On page 14 the appellees say—

> "We have emphasized the fact that Judge Hartwell expressed his intent upon one point, to wit, his desire to keep the trust fund in the family, and that our construction promotes that intention while appellants' construction overrides and defeats it."

This is just the reverse. Judge Hartwell was not his "family," while, if it went to Charles Hartwell Carter, under our construction, it remained in his "family."

On pages 18 and 19 of the appellees' brief the rule is given that, "where there is no expressed gift to the beneficiary, but the one gift to her is contained in a direction to the trustee to pay over or transfer at some future time, * * * the gift is contingent."

The words "the trust for Lottie Lee is *to cause the dividends to be paid to her*" are different from a mere direction.

But even if this be considered a direction, it does not apply to our case, since not only a direction, but words of gift are found in letters and a gift itself under the certificate of stock. See pages 14 and 15 of our main brief.

The rule is well stated in 40 Cyc., 1656—

> "Where, however, the gift and direction as to payment are distinct or there are words importing a gift in addition to the direction then the interest may be vested."

Very slight evidence has been held sufficient to show the intention of gift in connection with the direction (30 Enc. of Law, sec. ed., 773, and cases there cited).

As to the alleged distrust of Mr. Chater and discrimination against him (Appellees' Brief, pp. 7 *et seq.*), it is enough to say that he writes him that he is providing a home where Mr. Chater will be welcome (R., p. 37).

On pages 25 and 26 of the brief for the appellees certain cases are cited as holding that gifts of income lapse with the principal.

It seems to us that in some of these cases there is no gift of income distinct from the principal, so the courts naturally held the income went with the principal.

Such a case is *Gawler vs. Standerwick* (page 26 of Appellees' Brief), where there was a "legacy of two hundred pounds, with interest." In such a case, if there was no legacy, there was naturally no interest on the legacy.

In our own case there was a distinct gift of dividends for a fixed period.

In the other cases cited in the appellees' brief the court did not formally pass on the question of income.

As against these cases we would cite the following cases, very like our own, where there was a gift of income under a trust or an annuity, either for a fixed period or for the life of another person, and on the death of the beneficiary the question was expressly raised as to the income, the court holding in all these cases that it went to the estate of the person to whom it was given and not with the principal, or on a resulting trust, or to the surviving beneficiaries as joint tenants.

Eales vs. Cardigan, 9 Sim., 384:

A testatrix provided under her will: "I give unto my servants, Samuel Eales and Charlotte, his wife, an annuity of two hundred pounds each for their lives and the life of the survivor." Samuel Eales died, leaving his wife surviving. His estate contended that they were entitled to the annuity during the life of the wife. The estate of the testatrix contended that, considering the man was a servant, it could not be considered that the testatrix intended the annuity to be paid to the servant's estate, and that it went to them. *Held,* that it went to the husband's estate, which was entitled to the two hundred pounds a year during the life of the wife.

Lewes vs. Lewes, 16 Sim., 266:

A testator devised estate to trustees to pay three hundred pounds per year for the maintenance, clothing, and education of his son's children during the life of the father.

The son had three children, all of whom attained the age of twenty-one years; then one of them died. *Held,* that the personal representative of the deceased child was entitled to one-third of the three hundred pounds a year during the father's life.

Jones vs. Randall, 1 Jac. & W., 100:

In this case there was a bequest of an annuity to the children of A in equal proportions, to continue during their lives and the life of the survivor. One of the children died. *Held,* the annuity went to his estate. The court said:

> "It is only a conjecture that because the annuity is for the lives of the survivors, therefore, the survivors are to enjoy it. That would be raising an inference against the express words; the court cannot make a construction contrary to the expressions of the first part unless there be in it a necessary incompatibility with that which follows."

To the same effect see:

Byran vs. Twigg, L. R., 3 Eq. Cas., 433.

Morse vs. Ballou, 109 Me., 264:

One-third of an estate was left in trust for "The following uses and purposes * * * during the lifetime of my deceased daughter's husband, Willis B. Bridges, to pay over to said Fannie Bridges Robinson and Louisa Bridges Hill the net annual income and profits of the said one-third to said Fannie Bridges Robinson and Louisa Bridges Hill, said trust to continue till the death of Willis B. Bridges, then I order and direct my trustees to transfer and convey said one-third to said Fannie Bridges Robinson and Louisa Bridges Hill" or if not living "to their legal heirs." Mrs. Hill died while Willis B. Bridges was still living. The question on which instructions were asked was what became of Mrs. Hill's share of the income on her death. *Held,* it was a vested gift of income, and went to her executor. And so holding the court treated the income as a distinct gift from the principal. The court said (p. 267):

> "But nothing is said as to what shall be done with the daughter's share of the income accruing between her death and the termination of the trust. The gift of the income, unlike the gift of the principal, is made to the daughters alone. The heirs are not mentioned. The general rule is that a devise or gift to children gives a vested interest unless the contrary intention is shown by the will and we fail to find any contrary intention here."

Again on page 269 the court says:

> "The date of the termination of the trust fixed the heirs who shall be entitled to receive the principal * * * how can it be possible for the income to be paid over to the heirs, when the person so entitled to take cannot be ascertained until years afterwards when the trust ceases."

It is to be noticed that this is a gift by direction to the trustees.

In our own case it was also impossible to tell, on any view, who got the principal till the end of the three years, as the principal went in one direction if a child living, and in a very different direction if no child then living.

Stanwood vs. Stanwood, 179 Mass., 226:

Property was left in trust for twenty years, $600 per annum in income to be paid to two unmarried daughters, Annie and Margarette, balance of income to be divided among three other children. At the end of twenty years all the principal to be divided among all the children, their heirs and assigns. Annie died before the end of the twenty years. *Held,* that her share of the income which accrued after her death went to her estate.

All these cases hold there is a vested gift of income on facts very similar to our own.

If there is a vested gift of income in the above cases, surely there must be one in our own case, where there are words of absolute gift for a fixed period and where the presumptions and rules of construction are all in favor of a vested gift.

The last two cases also set out another principle which not only supports our contention as to the income, but also the contention in our main brief as to the principal, namely: A devise or gift to a child passes a vested interest unless a contrary intention is shown by the will. To the same effect see:

Bryant vs. Plummer, 111 Me., 511, at 517.
Hall vs. Holson, 167 Mass., 397, at 400.

Respectfully submitted,

DAVID L. WITHINGTON.
JOSEPH P. BELL.
CASTLE & WITHINGTON.
MORSE, KENNY & BELL.

(28430)

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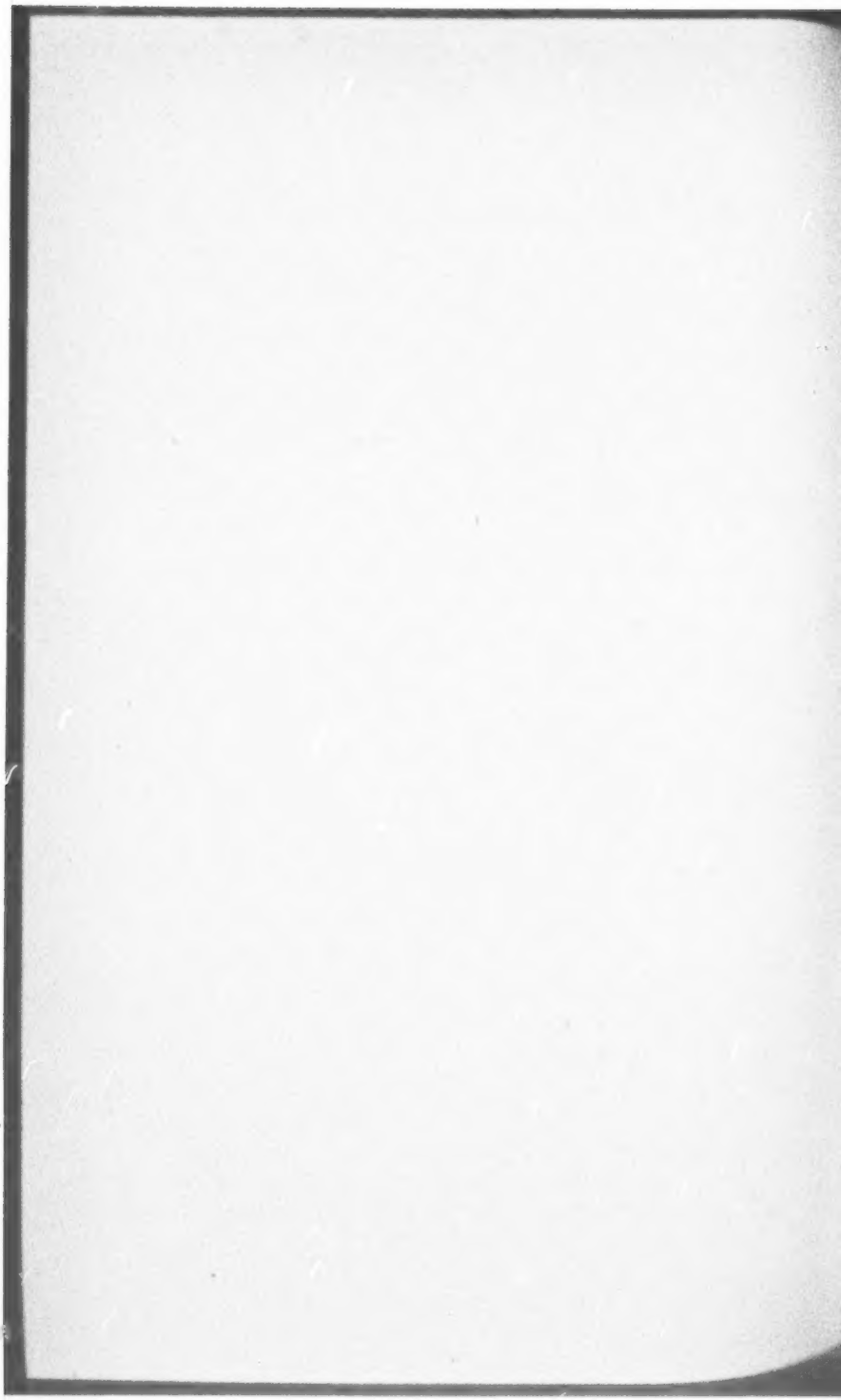

Supreme Court of the United States.

October Term, 1914.

No. 544.

CHARLES HARTWELL CHATER, a Minor, by his Next Friend and Guardian, Charles H. Chater, *et al.*, Appellants,

v.

ALFRED W. CARTER, Trustee; ALFRED W. CARTER, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; MABEL R. HARTWELL; and HAWAIIAN SUGAR COMPANY.

Brief of Appellants.

Statement of the Case.

Charlotte Lee Chater was one of seven daughters of the late Honorable Alfred S. Hartwell of Honolulu, Hawaii, who was, at the time of his death, chief justice of the Supreme Court of Hawaii.

On July 15, 1908, she married Charles H. Chater of Natick, Mass., and died on September 3, 1909, in childbirth, intestate, leaving the complainant, her husband, the said Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909. Charles H. Chater is the guardian of this child and also the administrator of his wife's estate.

On March 27, 1909, said Alfred S. Hartwell transferred to the name of "Alfred W. Carter, Trustee for Charlotte Lee Hartwell Chater," 585 of the shares of

stock of the Hawaiian Sugar Company, which he owned, and caused a certificate to be issued to the said Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater, for said 585 shares, and delivered said certificate to said Alfred W. Carter, trustee, and at the same time executed and delivered a declaration of trust, as follows:

"HONOLULU, T.H., March 27, 1909.

MR. ALFRED W. CARTER,
City.

Dear Alfred: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement — I hope it is — and that either of them has a right to call upon you to make over the shares to her at any time.

The trust for Lottie Lee is to cause the dividends

to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these, additional 585 shares they shall remain in my family.

I also enclose for you to retain for Mabel Certificate No. in her name for 200 shares Hawaiian Sugar Stock.

I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month, their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for her 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should

be retained in your office and to have that understood by them.

Very truly,

ALFRED S. HARTWELL."

At the same time similar certificates were issued and delivered to said Alfred W. Carter as trustee for Juliette Hartwell and Dorothy Hartwell for the shares mentioned in said letter.

Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

"HONOLULU, T.H. March 29, 1909.

MR. CHARLES H. CHATER,
South Natick, Mass.

My dear Mr. Chater: I have not been a good correspondent for I have had many cares and responsibilities resting upon me.

I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust

(as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her life-time, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.'

I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15, and June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

I will also cause the Brewers to continue to send the $75. a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June — I hope to do so — and to see you all — and am aware of the uncertainties of life, you know. Alfred will

arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead here to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in which I should like to stay, it now seems to me, when I am east in the summers.

You will know best whether to trouble Lottie Lee

just now to look this letter over. Do entirely as you think fit.

Faithfully yours,
ALFRED S. HARTWELL."

Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May, and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent said Alfred W. Carter receipts for the same. The receipts for the dividends for the months of April, May, and June were in the same form, the April receipt reading as follows:

"BOSTON, MASS., April 15, 1909.

"Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares Hawaiian Sugar Co. stock, held by him as my trustee.

CHARLOTTE L. H. CHATER."

Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of said dividends to Charlotte L. H. Chater.

After the death of Charlotte L. H. Chater, on September 3, 1909, the defendant Alfred W. Carter, without the knowledge or consent of the complainants, transferred said stock to Alfred S. Hartwell, and a new certificate was issued to Alfred S. Hartwell on November 29, 1909, by the defendant the Hawaiian Sugar Company.

On May 18, 1910, Alfred S. Hartwell transferred the stock to the defendant Mabel R. Hartwell, one of his daughters. She received same without consideration, as a gift from her father, but without knowledge that it was the same stock which her father had previously transferred to Alfred W. Carter, trustee for her sister, Charlotte L. H. Chater.

It is conceded, if admissible, that the above transfers were made by the defendants under advice of counsel.

Since August, 1909, no dividends have been received by Charlotte L. H. Chater or the complainants from said stock, but the same have been received by Alfred S. Hartwell or Mabel R. Hartwell.

Alfred S. Hartwell died on August 30, 1912, leaving a will of which the defendant Alfred W. Carter is the duly appointed executor.

The cash dividends on said stock from September 1, 1909, to January 1, 1910, amounted to $1404. The cash dividends on the stock from January 1, 1910, to January 1, 1913, amounted to $12,279.

On July 1, 1910, a stock dividend of 50 per cent was paid on said stock to Mabel R. Hartwell, from which she received 292½ additional shares of stock.

Charles H. Chater consents that any interest he may have in the stock or dividends may be accounted for and paid to him as guardian for said Charles Hartwell Chater.

The case comes up on appeal to this Court from the decision and decree of the Supreme Court of the territory of Hawaii, which affirmed the decree of the Circuit Court of Hawaii, dismissing the plaintiff's bill of complaint, which bill prayed that the stock in question, including that received by way of stock dividends, be

transferred to the complainants, and that the cash dividends be accounted for to the complainants.

Specification of Errors.

The assignment of errors (Record, p. 57) alleges, in substance, that the Court erred in holding that a trust resulted to Alfred S. Hartwell on the stock in question on the death of Charlotte L. H. Chater, and in deciding that no title to the stock or to the dividends declared between September 1, 1909, and January 1, 1913, passed to the complainants on Mrs. Chater's death.

Argument.

I. A PRESENT EQUITABLE TITLE TO THE STOCK VESTED IN MRS. CHATER, WHICH HAS NEVER BEEN DIVESTED.

There was a gift to Mrs. Chater of an absolute, equitable title to the stock, subject to the trust so far as expressed, and when that trust expired by its own limitations, the legal title followed the equitable title to Mrs. Chater's estate.

(1) An equitable title passed to Mrs. Chater, subject to the trust.

An equitable title is a present vested interest, an absolute equitable estate of inheritance, free and unqualified. The only difference between a legal estate and an equitable estate is that the one covers the legal title and the other the equitable title.

Pomeroy on Equity Jurisprudence, sec. 147.

There are many cases similar to our own, where the

Courts have held there was a gift of a complete equitable interest in the property, although this equitable interest might be divested by the passing of the legal title in a different direction under the trust.

Some of the cases which so hold are:

Hancock v. *Watson*, [1902] A.C. 14:

In this case the testator divided his estate into five parts, and then said, "to S.D. I give two of such portions." He then directed that these two portions should remain in trust for the life of S.D., and after her death they should go to her children, but in such a way that the gift over, after the life estate, was void for remoteness. On the death of S.D. it was held that the property went to the representatives of S.D., and not to the testator's next of kin.

Pearson v. *Dolman*, L.R. 3 Eq. 315:

In this case there was a bequest to a trustee for the benefit of A. so long as he did not commit an act of bankruptcy or transfer his interest. On the happening of either of the above events the fund was to be held in trust for the children of A.

The principal of the trust fund was to be paid A. on his attaining twenty-five years. In case he died under twenty-five the property went to his children. He died under twenty-five, unmarried, a contingency unprovided for. *Held*, A. took a vested interest, subject to be divested in the event of his bankruptcy or alienation of his interest, or on his death under twenty-five leaving children, and that as none of these events had occurred the interest remained and went to his estate.

Barclay's Estate, 93 Pacific (Cal.) 1012:

In this case, a father left property to his daughter in trust for her as long as she remained the wife of B. On his death, or her divorce from him, the principal to be given to her. She died, leaving her husband. *Held*, the trust property went to her husband. The Court said (p. 1015):

> "The will as modified by the codicil devised this property to S. C. Blackington [the wife] subject only to the execution of the trust . . . and such a devisee acquires a legal property as against all persons except the trustee."

Chauncey v. *Francis*, 181 Mass. 513:

In this case, there was a bequest of $1000 for S. to invest same and "pay the interest" to him or "expend any part or the whole for the benefit" of him. Absolute bequests of money preceded and followed it. *Held*, that S. was the sole equitable owner of the fund, and on his death it went to the representatives of his estate.

Haywood v. *Rowe*, 190 Mass. 1:

Testator left $500 to his housekeeper "to be put in trust of my executor and put in the savings bank, the income to be paid to her yearly and the executor can draw this money and buy a cheap place for her to occupy during her life, if he thinks it would be for her good." On the death of the legatee the fund remained in the hands of the trustee, unpaid. *Held*, the gift was absolute, subject to the trust, and on her death the legal title vested in the administrator of her estate.

Lippincott v. *Pancoast*, 47 N.J. Eq. 21:

In this case money was given to trustees to pay income to W. until such time as they deemed it proper to pay him the principal. The trustees never thought it proper to pay him the principal. On his death it was held that the right to the principal was vested and passed to his representatives.

In re Schmidt, 121 N.Y. Supp. 982:

A sum was placed in trust for a son, income to be paid to his guardian, the principal to be paid to him when he reached the age of thirty if, in the opinion of the executors, he had led a good and honorable life; otherwise, the executors to have the power to revoke the gift, principal then to go to executor's brother. The son died at the age of twenty-one, having led up to that time a good and honorable life, the gift never having been revoked. *Held*, the principal went to the son's estate. The Court said (p. 984):

> "The son, therefore, took under the will a present, vested interest in the fund, subject to being divested upon the happening of a condition subsequent."

Greene v. *Wilbur*, 15 R.I. 251:

Real estate was devised to trustee to pay income to beneficiary, no time limit being set during which payment was to continue. In case of insolvency or attachment, the beneficiary's rights to income should terminate, and the same to be paid to C. *Held*, the beneficiary had an equitable fee which passed to his heirs, he having died without change having been made in the trust.

Denton v. *Denton*, 17 Md. 403:

In this case there was a transfer of shares to a trustee for the use of a wife and child, then to such persons as the wife might appoint. The wife died, leaving a child, but without making an appointment. *Held*, the child took an equitable title. All purposes of the trust having ceased, an absolute estate vested in the child.

Canfield v. *Canfield*, 118 Fed. 1:

In this case testator left property "in trust for the use and benefit" of his brother. The trustee could withhold income and principal, or turn it all over to him. There was no provision over on death of brother. The brother died, the principal never having been paid to him. *Held*, the estate vested in the brother, subject to the rights of the trust, and therefore passed to his estate.

In re Currie's Settlement, L.R. [1910] 1 Ch. 329:

In this case a trust ended because there was no provision made for an unforeseen situation. The Court held that it was the intention of the donor to give the beneficiary the entire interest, subject to the trust, and, the trust having failed, the beneficiary's estate took the property free and clear. In the opinion the Court quotes with approval the language in *Lassence* v. *Tierney*, 1 Mac. & G. 551, at 561:

> "If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee. Upon the failure of such objects, the absolute gift prevails."

See also *Kellett* v. *Kellett*, L.R. 3 H.L. 160, at 168 —

where the doctrine of *Lassence* v. *Tierney* was affirmed.

On the facts in our case we believe that there was an absolute gift in equity of the stock to Mrs. Chater, subject to the trust.

The wording of the certificate, "Alfred W. Carter, as trustee for Lottie Lee Chater" (Record, p. 35), passed a complete title in equity to the beneficiary, since the certificate represents the title to the stock, and under the wording of the certificate Mrs. Chater was the sole beneficiary named. The common instance of this kind is where a savings-bank book is placed in the name of a trustee for a beneficiary, but the general principle is the same in both cases.

See the following savings-bank cases:

Gerrish v. *New Bedford Inst. for Savings*, 128 Mass. 159.
Minor v. *Rogers*, 40 Conn. 512.
Re Atkinson, 16 R.I. 413.
Martin v. *Frink*, 75 N.Y. 134.
Conn. River Bank v. *Albee*, 64 Vt. 571.
Sayre v. *Weil*, 94 Ala. 466.
Petty v. *Petty*, 22 L.J. Ch. 1065.

In addition to the wording of the certificate there are the following further facts, showing that there was an absolute gift of the stock to Mrs. Chater, subject to the trust:

In the letter to Mr. Chater (Record, p. 36), disclosing

the trust, the donor says, "*Am now dividing the shares* in the Hawaiian Sugar Company stock, which formerly had been pledged for my indebtedness . . . *in such a way as to give Lottie Lee 585 shares more*, which I am placing with Alfred W. Carter in trust," etc.

Again, in the same letter, he says (Record, p. 37), "I am making the same apportionment between Madeline, Lottie Lee, Juliette, Bernice, and Dorothy, future arrangements for others to await contingencies."

In the letter to Mr. Carter, enclosing the certificates, the donor says (Record, p. 35), "Either of them [Bernice or Dorothy] *has a right to call upon you to make over the shares to her at any time.*"

The certificates were all made out in the same way (Record, p. 35). If Bernice and Dorothy could ask for a transfer of the stock, and therefore had the full equitable title to the stock, Mrs. Chater would have the same title. Bernice and Dorothy's equitable interest was in terms subject to a trust, just as Mrs. Chater's was.

The fact that other like gifts made at the same time were treated as absolute by the donor, is evidence that the gift to the beneficiary in question was of the same character.

Chauncey v. *Francis*, 181 Mass. 513.

The whole tone of the letter to Mr. Chater (Record, p. 37) is of a testamentary character, showing that the donor was making an absolute gift of the property, in view of possible death. In such a case he is presumed to intend to dispose of his entire interest.

See *Given* v. *Hilton*, 95 U.S. 591.
Patrick v. *Blair*, 119 Mo. 105.

Note the following language in the letter to Mr. Chater:

> "I am in my will giving my homestead here to Juliette."
>
> "I am quite likely to go East in June — I hope to do so — and to see you all — am aware of the uncertainties of this life, you know."

The fact that the donor makes no gift over in case of Mrs. Chater's death, but he does make a gift over on the contingency of a child not being alive at the end of three years, is evidence that a complete equitable interest was intended to pass to Mrs. Chater.

> *Fay* v. *Phipps*, 10 Met. 341, at 343.
> *Fuller* v. *Winthrop*, 3 Allen, 51, at 60.
> *Holden* v. *Blaney*, 119 Mass. 421, at 425.

On all the above we contend there was a complete equitable gift of the stock to Mrs. Chater.

(2) The trust having expired by its own limitation, without divesting the beneficiary of her equitable title, the title of the beneficiary becomes complete, and the legal title follows the equitable title to the beneficiary or her estate.

If the equitable title is in Mrs. Chater, subject to the trust, this follows as a matter of course.

The rule is well stated in the case of *Hancock* v. *Watson*, [1902] A.C. 14, at 22:

> "It is settled law if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest

> which fails, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatees or next of kin as the case may be."

Note also the language of the Court in the case of *Doe* v. *Considine*, 6 Wall. 458, approved in *Young* v. *Bradley*, 101 U.S. 782, at 788:

> "It is well settled that where no intention to the contrary appears, the language used in a trust will be limited and restricted to the purposes of its creation and when they are satisfied the estate of the trustee ceases to exist and his title becomes extinct."

In our case, the trust expired because the donor did not expressly provide for a particular contingency, but this does not change the rule that the equitable owner, in such a case, gets the complete title, the legal title following the equitable title, the trust having expired by its own limitation.

We believe that the doctrine that there is no resulting trust to the donor in the case of a trust for the benefit of a wife or child is really based on the underlying principle which we have set out here, and that in such cases the Court finds a complete equitable estate in the wife or child because of the general intent to benefit the wife or child, and that for this reason there is no resulting trust to the donor.

We will, however, take this up in the following section.

II. THERE IS NO RESULTING TRUST TO THE DONOR IN THE CASE OF A GIFT TO A CHILD.

The only way in which the stock could go back to Mr. Hartwell is by express trust or by resulting trust. No contention is made that it went back to the donor by express trust. This leaves the only ground on which the appellees claim that the stock went back to the donor to be by way of resulting trust.

Under our previous contention, I, and our subsequent contentions under III and IV, there would be no resulting trust, as there would be no interest left undisposed of on Mrs. Chater's death.

Even if the contentions of the appellees are so far correct that in the ordinary case of this kind there would be a resulting trust, we still claim that in the case of a gift to a child, there is a good consideration of love and affection, and the beneficial interest goes *prima facie* to the child and not to the donor.

> "A good consideration is such as that of love or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty." 2 Blackstone, Comm., p. 297.
>
> "A good consideration is founded upon natural love and affection between near relations by blood." 4 Kent, Comm., *464.
>
> "In cases where a conveyance is made by one to his wife or child, if unadvanced, no trust will ordinarily result to the donor, though none be declared in the deed." Washburn, Real Prop., sec. 1424.

The case before us is exactly that of a gift from parent

to child, and the consideration is of love and affection, so that there is no resulting trust to the donor, the beneficial interest follows the consideration, and the consideration of love and affection carries it to Mrs. Chater or her estate, or, as better expressed by this Court in the case of *Jackson* v. *Jackson*, 91 U.S. 122:

> "The circumstance that the grantee stands in one of these relations [husband and wife, or father and child] to the party is of itself sufficient evidence to rebut the presumption of a resulting trust and to create a contrary presumption of an advancement for the grantees' benefit."

The common instance in this country of the above principle is the case of a conveyance to a wife or child by a third person, where the consideration is paid by the husband or father.

See cases generally in 39 Cyc. 143.

The English Courts have applied this doctrine, not only to the cases of this character, but to all other cases where gifts are made for the benefit of a wife or child, such as our own case.

Doyle v. *Crean*, [1905] 1 Irish Rep. 252.
Sweetman v. *Butler*, [1908] 1 Irish Rep. 517.
Ward v. *Dyas*, Ll. & G., *temp.* Sugden, 177.
Campbell v. *Bourigg*, 1 Philip, 301.
Cape v. *Cape*, 2 Y. & C. 543.
Dyer v. *Dyer*, 2 Cox, 92.
Tiffany & Bullard on Trusts, 24.
Lewin on Trusts (12th ed.), 164, 165.

Some of these English cases say that there is a resulting trust to the wife or child and other cases find a beneficial gift in the first instance to the wife or child, which gift remains after the trust expires. The result is the same in either case.

We cannot find that this question has ever been raised in this country, except in the case of the purchase of property where title is placed in the name of wife or child, already referred to, but the principle is the same in both cases, and the English cases should be followed in this country as correct in principle.

III. THERE WAS A VESTED FUTURE INTEREST TO MRS. CHATER, WHICH DID NOT LAPSE ON HER DEATH.

An estate is vested when there is, 1, an immediate right of present enjoyment, or, 2, a present fixed right of future enjoyment.

We have already taken up 1 under our first contention, that the donor transferred to Mrs. Chater an absolute equitable title to the stock.

Even if this contention is not accepted, we still believe that the trust passed a future vested interest.

(1) General rules of construction favor a vested gift in this case.

Before taking up the various rules of construction, we wish to refer to authorities which hold that the same rules of construction apply to deeds as to wills.

Tindall v. *Tindall*, 167 Mo. 318.
Underhill & Strahan on Wills (1906), p. 267, citing cases.
Perry on Trusts, sec. 320.
Young v. *Bradley*, 101 U.S. 782, at page 788.

(*a*) The law favors a vested, rather than a contingent, interest.

McArthur v. *Scott*, 113 U.S. 340.
Doe v. *Considine*, 6 Wall. 458.
24 Enc. of Law (2d ed.), 392, cases cited in note 4.
30 Enc. of Law (2d ed.), 765, cases cited in note 5.

(*b*) A gift of intervening income is evidence of an immediate vesting of the gift of the principal even though the gift be contingent in form.

Theobald on Wills (7th ed.), p. 586, and cases cited.
Hersey v. *Purrington*, 96 Me. 166.
Fuller v. *Winthrop*, 3 Allen, 51, at 60.
Newbury v. *Henman*, 49 Conn. 130.
Toms v. *Williams*, 41 Mich. 552, at 565.
Mostyn v. *Brunton*, 17 Irish Ch. 153.
Re Orme, 1 Irish Ch. 175.

(*c*) Failure of the donor to provide a gift over is evidence that the gift was not intended to be contingent.

Fay v. *Phipps*, 10 Met. 341, at 343.
Fuller v. *Winthrop*, 3 Allen, 51, at 60.
Holden v. *Blaney*, 119 Mass. 421, at 425.

(*d*) The fact that other like gifts made at the same time, in the same way, and referred to in the same letter were treated by the donor as vested is evidence that the Chater gift was vested.

Chauncey v. *Francis*, 181 Mass. 513.

(*e*) Language in a trust is to be construed most strongly against the party using same; that is, it will be construed in favor of the beneficiary rather than the donor.

Rothschild v. *Dickinson*, 169 Mich. 200.
Ringrose v. *Gleadall*, 17 Cal. App. 666.
Jones v. *Butler*, 30 Barb. (N.Y.) 641.

(2) The language of the transaction itself shows a vested gift.

(*a*) The wording of the stock certificate "Alfred W. Carter, Trustee for Lottie Lee Chater," is language of an absolute or vested gift. See cases cited under I (p. 14 of Brief).

(*b*) "Unless at the end of the three years she shall have no child living." These are words of condition, but of a condition subsequent which has never occurred.

(*c*) The words "if she shall then be living" were not intended to impliedly limit the gift to her personally, because there is no gift over provided for such a contingency and no direct provision that death shall divest her of the stock.

We believe these words are mere words of direction.

Note the language of the Court in the case of *Hyde* v. *Rainey*, 233 Pa. St. 540, at 549:

> "When the contingency is annexed to the payment or enjoyment of the gift, and not to the substance of the legacy, it will be construed as vested."

In the case of *Cooper* v. *Pridgeon*, 17 N.C. 98, the Court said:

> "The first part certainly gave a present interest.

> . . . 'If,' though generally denoting a condition, does not necessarily do so. It is apparently not used in that sense. Here it is not referable to the interest in the legacy, but to the enjoyment of it, and is in a distinct sentence."

In the case of *Weston* v. *Weston*, 125 Mass. 268, at 271, property was left in trust, income to be paid wife during life, and on the death of the wife remainder to be paid to son and daughter, "if both survive my said wife," but if either predeceased the wife without issue, then the surviving son or daughter took the entire remainder. The Court said:

> "The words: 'if both survive my said wife' are to be regarded as qualifying the previous words 'in equal shares' and not as affecting the vesting of the gift. . . .
>
> "We are of opinion that the will gave Nathaniel and Lucy each a vested equitable estate, expectant on the termination of the life estate of the testator's wife and liable to be divested only on his or her death during the life of the testator's wife, without issue."

So, in the case at bar, the words "if she shall then be living" refer to Mrs. Chater's enjoyment of the principal, and are not words of condition. They refer to the mode of her taking, and should not be construed "as affecting the vesting of the gift."

The clause beginning "Unless at the end of three years she shall have no child living" is the conditional clause in the trust; and if the sentence in question was intended to be conditional, this would have been the

natural place to have put it. It would then have read, "Unless she shall then be living."

The use of the clause "if she shall then be living," in the place in which it stands in the sentence, arises from the fact that in the donor's mind he has already given the stock in trust for Mrs. Chater, and modifies it by providing that, if she is living at the end of the period, she may continue the trust, and that, if she has no children living, then an interest is limited to and then arises in the sisters and their children contingent on survivorship.

That the word "if" does not necessarily import a condition in cases of this character, note the cases given below, where "if" is held to mean "when."

Crosby v. *Wendell*, 6 Paige, 548.
Furness v. *Fox*, 1 Cush. 134.
Buck v. *Paine*, 75 Me. 582.
Janney v. *Sprigg*, 7 Gill (Md.), 197, 202.
Smart v. *Clark*, 3 Russ. Cases, 365.
Billings v. *Sandom*, 1 Bro. C.C. 393.
Rood on Wills (1904), sec. 585.

(*d*) The words at the end, "my object being, . . . as to these additional 585 shares, they shall remain in my family," add nothing to what has gone before, since, on the terms already expressed, if Mrs. Chater had lived the three years, put the stock in her own name, and then died, leaving the child, a third interest in the stock would have passed to Mr. Chater. All that was intended by this clause was that the donor did not wish Mrs. Chater to retain a vested interest in the stock unless there was a child living at the end of three years.

A similar view was taken by the Court in the case of *Holden* v. *Blaney*, 119 Mass. 421, where property was placed in trust for a daughter, and the donor said, "My object in thus limiting the payment of my said daughter's share of my estate during the life time of her said husband is to prevent his having any share or benefit of or from my estate." The daughter died, leaving the husband surviving. The Court held that the gift was vested, and went to the husband in spite of this clause.

IV. THERE IS AN IMPLIED GIFT TO CHARLES HARTWELL CHATER ON THE DEATH OF HIS MOTHER BEFORE JANUARY 1, 1913.

Even if the gift to Mrs. Chater was not vested, in accordance with our previous contentions, we believe there is ground for claiming that there is an implied gift to Charles Hartwell Chater on the death of his mother prior to January 1, 1913.

The clause "Unless at the end of three years she shall have no child living" immediately leads us to the conclusion that, if there *was* a child living, it took. At the time of writing the child was three months in gestation, and unquestionably the donor had this fact in mind when writing the paragraph. If the child did not live, he intended to cut down Mrs. Chater's estate to a life interest, but if the child did live, her estate remained absolute. The whole intent and purpose of the trust seems to be the desire of the donor to have a grandchild, through Mrs. Chater, living at the end of three years. If the child and mother are living, there is no question as to the mother's full interest, showing an intention to benefit both mother and child, and the

carrying out of the idea that the stock is to remain in "my family."

There is no express provision for this grandchild, but, taking into consideration the trust clause as a whole and the surrounding circumstances, there seems to be an implied gift to him.

An implied trust is one declared by a party, not directly, but by implication, which, however, the Courts will carry into effect.

Lewin on Trusts (12th ed.), p. 124, note.

The following are leading cases on implied trusts:

Metcalf v. *Framingham Parish*, 128 Mass. 370:

Trust of 100 shares of stock, income of same for life to N. (1) If N. died before W., then one half of said stock to go to a charity absolutely, the income of remaining half to go to W. during his life. (2) If W. died before N., then all stock to go to said charity on N.'s death.

There were no provisions in the trust under (1) as to where the principal went on the death of W. *Held*, not a resulting trust, but the charity took the same by implication.

Underhill v. *Rider*, 2 Ch. Div. 498:

Devise to widow for life, if she shall not marry; if she shall marry, then property goes to X. No provision for remainder in case widow dies unmarried. *Held*, that X. took the full estate by implication in such case.

Close v. *Farmers Trust Co.*, 195 N.Y. 92:

One sixth of property to trustee for daughter, and on "her dying without issue" to brothers and sisters. *Held*, a gift of residue by implication to the issue of the daughter.

Beilstein v. *Beilstein*, 194 Pa. 152:

A devise over in case a daughter should die "without leaving a family" is an implied devise to her family if she should leave one.

Ball v. *Phelan*, 94 Miss. 293:

Testator created an estate in favor of his daughter for life, free from the control or debts of her husband, he to have no interest at her death, or by inheritance through their children, and provided that, in case the daughter should die without children, or a child should die before marrying or becoming of age, then the property should go to other persons mentioned. *Held*, a devise by implication in favor of the grandchild.

Holton v. *White*, 23 N.J. L. 330:

A devise in a will "that in case my son, Eli, dies before the expiration of said lease, then the house and lot called Oak Island shall descend to my son, Andrew," there being no express devise of Oak Island to Eli, is a devise to Eli by implication.

In a word, we believe the language "unless at the end of the three years she shall have no child living," taken in connection with all the terms of the trust, implied that, if she has a child living and is herself dead, the gift does not lapse, but passes to the child by implication.

V. DIVIDENDS.

The appellants contend that in any event the gift of the dividends to Mrs. Chater for the period of three years was absolute, and passed to her estate.

(1) The exact language as to these dividends is one of an absolute vested gift.

The language as to the dividends is as follows: "The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next."

Thus the donor directed the dividends to be paid to her for three years, and then directed what should be done with the principal, "if she shall *then* be living."

This is the language of an absolute gift, and the gift would vest when the trust was completely executed by the delivery of the stock to Mr. Carter. That a gift of property or an interest in property may be made in the form of a trust is, of course, fundamental.

14 Enc. of Law (2d ed.), 1026.
20 Cyc. 1199.

(2) The general rules of construction favor a vested gift as to the dividends.

(*a*) The law favors a vested, rather than a contingent, gift.

Carr v. *Smith*, 25 N.Y. App. Div. 217.
Doe v. *Considine*, 6 Wall. 458.
McArthur v. *Scott*, 113 U.S. 340.
Carstensen's Estate, 196 Pa. St. 325.
24 Enc. of Law (2d ed.), 392.
30 Enc. of Law (2d ed.), 765.

(*b*) Where language sets out a complete gift, the

Court will not override or cut it down unless the language contra is clear and unequivocal.

Federhen v. *Kibbey*, 204 Mass. 291, at 293.
Foster v. *Smith*, 156 Mass. 379.
McClellan v. *Mackenzie*, 126 Fed. 701 (C.C.A.).
30 Enc. of Law (2d ed.), 687, 688.

In our case, under the above rule, the language to the contrary being not only uncertain and equivocal, but entirely inferential, the Court should not let it override the words of direct gift of the dividends for three years.

(3) The construction of the particular clause shows a vested gift.

The donor used the words "If she shall then be living" in connection with the gift of the principal, but did not use them in connection with the gift of the dividends. Where words are used in one place and omitted in another, this is ground for holding that the donor made a distinction between the two and intended the words to apply in one case and not in the other.

17 Enc. of Law (2d ed.), 25.

Failure of the donor to provide any gift over of this income is indicative of a vested gift (see cases cited on page 21 of Brief).

If the gift of dividends was vested, it, of course, did not lapse on Mrs. Chater's death, but passed to her estate.

(4) We have been unable to find any cases on the precise question whether a gift of income or dividends for a term of years passes to the estate of the beneficiary, but there are many analogous cases.

(a) An annuity so passes.

In re Orde, 12 Ch. D. 22.

(*b*) Gifts of income of real estate for years or for a particular period do not terminate on the death of the beneficiary, but pass to the estate of the beneficiary.

Hellwig v. *Bachman*, 26 Ill. App. 165.
Jacquat v. *Bachman*, 26 Ill. App. 169.
Hopewell v. *Patterson*, 36 S.W. (Texas) 319.
Hillman v. *Mangeberg*, 89 Cal. 268.
Alsup v. *Banks*, 68 Miss. 664.

(*c*) An interest in a life insurance policy, issued for the benefit of a person other than the insured, although payable at a future time, vests immediately, and on the death of the beneficiary passes to his estate.

Millard v. *Brayton*, 177 Mass. 533, at 542.
Continental Life Ins. Co. v. *Palmer*, 42 Conn. 60.
Conn. Life Ins. Co. v. *Fish*, 59 N.H. 126.
Preston v. *Conn. Ins. Co.*, 95 Md. 101.
Entwistle v. *Travelers Ins. Co.*, 202 Pa. St. 141.
D'Arcy v. *Mutual Ins. Co.*, 108 Tenn. 567.

The gift being of "dividends," not "income," we contend that "dividends" covers "stock dividends" as well as "cash dividends."

The trust became operative at once in March, 1909, by act of the parties under donor's letter to Mr. Chater of March 29, 1909, by which dividends were paid at once.

That the act of the parties would control see—

Anderson v. *Kemper*, 116 Ky. 339.
In re Lorenz' Estate, 124 Cal. 495.
Ives v. *Sanguinnetta*, 10 Ariz. 83.

In any event, a trust, when effectually declared, becomes at once binding, even though it may by its terms commence in the future.

24 Enc. of Law (2d ed.), 437.
39 Cyc. 43.

VI. THE DEFENDANTS MABEL R. HARTWELL, ALFRED W. CARTER, AND HAWAIIAN SUGAR COMPANY ARE LIABLE TO THE COMPLAINANTS.

Mabel R. Hartwell was not a purchaser for value, and therefore is liable for the stock and dividends received.

Joslyn v. *Downing*, 150 Fed. (C.C.A.) 317.
Otis v. *Otis*, 167 Mass. 245.
39 Cyc. 567, note 76.

Alfred W. Carter is not excused by the fact that he acted under advice of counsel.

Freeman v. *Cook*, 41 N.C. 373.
Owings v. *Rodes*, 65 Md. 408.
Gilmore v. *Tuttle*, 32 N.J. Eq. 611.

The Hawaiian Sugar Company is bound because the stock certificate gave them notice of the trust.

Loring v. *Salisbury Mills*, 125 Mass. 138.
Bayard v. *Farmers' Bank*, 52 Pa. St. 232.
See also *Duncan* v. *Jaudon*, 15 Wall. 165.

Respectfully submitted,
DAVID L. WITHINGTON,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 544.

BILL IN EQUITY.

CHARLES HARTWELL CHATER (A MINOR), BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER; CHARLES H. CHATER, IN HIS OWN RIGHT AND AS GUARDIAN OF SAID CHARLES HARTWELL CHATER (A MINOR), AND CHARLES H. CHATER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE LEE HARTWELL CHATER, DECEASED, APPELLANTS,

vs.

ALFRED W. CARTER, TRUSTEE; ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED; MABEL R. HARTWELL, AND THE HAWAIIAN SUGAR COMPANY, A CORPORATION, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES.

Statement of the Case.

A brief amended stipulation of facts signed by all the parties to this case is a part of the record herein (printed pages 34-39), and there is no further evidence before the

court. It is therefore unnecessary to set out the facts except in briefest summary.

The late Chief Justice Hartwell by a letter dated March 27, 1909, to Alfred W. Carter created a trust under which Judge Hartwell's daughter "Lottie Lee" Chater was the main beneficiary. This letter enclosed, *inter alia,* a certificate for certain shares in the Hawaiian Sugar Company, the subject-matter of the trust, in the name of Mr. Carter as trustee for the said daughter. On August 30, 1909, Mrs. Chater gave birth to a child, her first born, and died September 3, 1909. Thereafter Judge Hartwell, having already received from Mr. Carter the dividends accruing subsequent to Mrs. Chater's death, made a demand on him for the stock itself, and having received the same from Mr. Carter, transferred it on May 18, 1910, to another daughter, Mabel R. Hartwell. Mr. Chater, on behalf of the child, brought suit in equity for the said stock, and for the dividends thereon subsequent to August, 1909. The Circuit Judge of Hawaii who tried the case, held that on the death of Mrs. Chater prior to January 1, 1910, there was a resulting trust of both the stock and subsequent dividends to Judge Hartwell, and that consequently Mr. Carter acted rightly in paying the dividends and transferring the stock to Judge Hartwell, and that neither Mr. Chater nor the child had any interest in the same. The Supreme Court of Hawaii by a unanimous decision affirmed the decision of the circuit judge.

The question before this court is whether Mr. Chater or the child on the death of Mrs. Chater took any interest in the stock or in the dividends subsequently accruing therefrom.

ARGUMENT.

On the death of Mrs. Chater prior to January 1, 1910, there was a resulting trust of both the stock and the subsequently accruing dividends to Judge Hartwell.

The problem before us is to determine the intention of Judge Hartwell, the creator of the trust, as expressed in the trust instrument, his letter dated March 27, 1909.

There is no suggestion that Judge Hartwell's intention, whether it was in accord with the construction of the appellants or with the construction of the appellees, is illegal because of any positive rule of law such as the rule against perpetuities. The rules applied by the attorneys on each side in this case are rules of construction which are intended only to promote the intention and which are never properly applied to defeat the intention. While the attorneys for the appellants agree theoretically to this, we submit that in reality they are attempting to thwart the intention of the creator of the trust by the application of technical rules. We maintain that we are defending and promoting the actual intention of Judge Hartwell shown by the trust document itself as well as by his acts subsequent to the establishment of the trust. The argument of the attorneys for the appellants is mainly based on rules of law as to presumptions and implications. As Circuit Judge Dickey said in his decision (printed page 22): "Implication must be piled on implication" by the appellants in order to reach their conclusion.

The arguments based on the terms of this particular trust instrument and the surrounding circumstances seem to us so much more important than the application of formal rules or the attempt to apply decisions in somewhat similar cases that we ask the indulgence of the court in stating these arguments in greater fullness than is usual.

> "But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determination in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention."
>
> *Robinson vs. Portland Female Orphans' Asylum,* 123 U. S., 702.

The proper method in approaching the question of the construction of a trust instrument is first to take the words of the instrument in their natural and literal sense, and then to ask if there is any reason why they should not be taken in that sense.

The words of the trust letter, if taken in their natural and literal sense, provide for a gift of the stock contingent on the survival of Mrs. Chater on January 1, 1913, without any provision for the death of Mrs. Chater before that date. Judge Hartwell did not make a free, absolute gift, merely postponing the right of possession of the principal; the trust is guarded and limited and conditional. The gift of the principal at the end of the three years is expressly contingent on the survival of Mrs. Chater, "and if she shall then be living." "If," the strongest conditional word, is used. Moreover, the gift of the principal at that time was in the alternative. The shares were to be transferred to Mrs. Chater, or to be held in trust for her benefit "as she may in writing request." Surely Judge Hartwell contemplated that she would be surviving at the time. If she were not alive, she could make no written request, nor would there be any way of deciding between the alternatives. No instructions were given to the trustee to govern the contingency that she should not be alive at that time. The right to make a written request is a matter of personal choice, not to be inherited by her heirs or to be exercised by her legal representatives. As Judge Dickey says (printed page 22), both the clause "if she shall be then alive" and the clause "as

she may in writing request" must be ignored if the gift of principal is to be held vested and not conditional. The provisions applying to the shares read as follows: "*If she shall then be living* to transfer the shares *to her* or hold them in trust *for her benefit* as *she* may in writing *request*, unless at the end of the three years *she shall have* no child living, in which case the trustee is to hold the stock paying *her* the dividends *during her lifetime*, with power to change the investment and vary it at any time at discretion and *at her death* to divide the trust funds," etc. The dependence of all these provisions on the beginning clause "if she shall then be living" is shown, not merely by the grammatical construction, but by the fact that that contingency is carried through the entire set of clauses, being repeated several times in different forms. The alternatives are (1) if she is living and has a child and in writing requests the shares the trustee is to transfer the shares to her; (2) if she is living and has a child and requests the trustee to hold the shares for her the trustee is to hold them for her; (3) if she is living and has no child living the trustee is to hold the shares and pay her the dividends during her lifetime and at her death to divide the trust funds among her sisters, nephews, and nieces. Every one of these provisions in its own terms requires her survival in addition to their all being dependent upon the primary clause "if she shall then be living."

Aside from the general conditional language and the limited nature of the gift to Mrs. Chater, there are three outstanding facts which challenge our attention. The first is Judge Hartwell's distrust of Mr. Chater; the second is the fact that not merely is the transfer of the stock postponed to the future, but the payment of any dividends even is postponed until nine months after the establishment of the trust; the third is the fact that there is no gift direct or indirect, to any child of Mrs. Chater. These last two facts, namely, the postponement of the payment of the dividends

even and the omission of any gift, direct or indirect, to the expected child of Mrs. Chater require a reason. The reason is found in the first fact, that is, Judge Hartwell's distrust of Mr. Chater. The appellants can offer no reason. That first fact is the motive and the motive is a vitally important factor in the intention.

Let us take up these facts separately, considering first the fact of Judge Hartwell's distrust of Mr. Chater. We can be absolutely sure of Judge Hartwell's intention as to one point, that is, that Mr. Chater should not share in the trust fund. Judge Hartwell expressly stated that intention, saying, "my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family." Other elements of Judge Hartwell's intention may have to be implied; this element is expressed. Appellants have endeavored to make a distinction between the stock itself and the dividends thereon, claiming that there is nothing to indicate that Judge Hartwell wished to exclude Mr. Chater from sharing the dividends. It seems to us that this is altogether too narrow an interpretation of the clause which is quoted from Judge Hartwell's letter. Judge Hartwell was indicating in characteristically courteous words his intention that Mr. Chater should take no share in the trust estate, whatever happened. He did not wish to emphasize the point unnecessarily or to go into details as to the exclusion of Mr. Chater. The clause quoted would seem to him as to almost any man to cover the income from the shares, to wit, the dividends, as well as the shares themselves, so that it did not seem necessary to add a specific exclusion of Mr. Chater from the dividends also.

Judge Hartwell's distrust of Mr. Chater is not, however, to be found only in the one expression which we have quoted; it is shown throughout the entire trust instrument. It is shown in the contrast between his attitude toward Mr. Chater and his attitude toward the husband of Mabel Hartwell, another of his married daughters mentioned in the

trust instrument, and toward Mr. Carter himself, another son-in-law. As Judge Dickey points out, Judge Hartwell's attitude toward Mr. Chater is not one common to all his sons-in-law, it was not a general precautionary attitude, a general desire that his married daughters and their children should be protected against their husbands. In the same letter Judge Hartwell makes a gift to another married daughter, Mabel, of 200 shares of stock, with no trust attached, and Alfred Carter, a son-in-law, is made the trustee by this very instrument for several of the daughters and is addressed by Judge Hartwell as "Dear Alfred," while Mr. Chater is spoken of as "Mr. Chater." Furthermore, the whole scheme of the trust provisions for Mrs. Chater shows Judge Hartwell's intention to exclude Mr. Chater from any benefit thereunder. Above all, the subsequent actions of Judge Hartwell prove his attitude toward Mr. Chater.

Appellants claim that Judge Hartwell's letter to Mr. Chater, dated March 29, 1909, refutes our contention on this point. Our claim, however, is that Judge Hartwell's attitude at this time was one of distrust, not of present condemnation or open hostility, but of distrust for the future, or at least of doubt, and the said letter, to be read as it pretty surely would be by Judge Hartwell's daughter, is consistent with that attitude.

The second fact to which we refer was the postponement of the payment of any dividends more than nine months after the date of the letter. That is a curious provision. It surely needs explanation. It is a different provision from that made for any of the other daughters by the letter. It is such an unusual provision that if we are not mistaken the attorneys for the appellants have not found and included in their brief any similar case. It cannot have been an oversight. It is far different in its nature from the failure to provide for a future contingency. Any lawyer who is accustomed to drawing trust provisions knows how easy it is to overlook some possible contingency in the future. Here,

however, we have no failure to provide, no omission, nothing negative, but rather something positive. There is an expressed affirmative provision that the dividends are to be paid to Mrs. Chater, beginning with the following January 1, a little more than nine months in the future, the letter being written the latter part of March. Judge Hartwell had just been making gifts for several other daughters in the same letter and providing for the immediate payment of dividends. In the paragraph devoted to Mrs. Chater he expressly differentiates the gift to her and provides for the payment only in the future. What was the reason for this postponement? There were two reasons closely related, namely, the desire not to give any vested interest even in the dividends to Mrs. Chater, and the desire not to give the intermediate income, which might be considered evidence of the immediate vesting of the future gift of the principal. The former is the main reason. At the time of the writing of the letter Mrs. Chater had been married about eight months. She was about to have a child, the period of gestation being already advanced several months. Judge Hartwell knew of this fact and had it in mind at the time of writing the letter. He contemplated the birth of a child in the following autumn and he undoubtedly also contemplated the possibility that Mrs. Chater might die in childbirth. She was 32 years of age at the time. With these possibilities in his mind he foresaw just what has actually happened, the mother dying and the child surviving, and Mr. Chater being appointed the guardian of the property of the infant. The statement of facts shows that Mr. Chater and the child are the two heirs of Mrs. Chater. For twenty years the father as guardian will have control of the child's property. Judge Hartwell had in mind the practical side of the matter and not the technical side of legal ownership. Judge Hartwell knew then that if Mrs. Chater should die in childbirth in the autumn, and if he had given her any right either in the stock or dividends which vested prior to that

time Mr. Chater would inherit either a part or the whole of that right according to whether the child survived or not, and that even if there were a child surviving Mr. Chater would not only inherit a part of the vested interest directly, but would control the remainder of it for twenty years. This was the very situation which Judge Hartwell intended to prevent. He assumed that if Mrs. Chater survived the crisis in the fall she would probably live at least for some years to come. He therefore decided to give her no right which would vest before that crisis, and, therefore, he postponed the payment of dividends until January 1. He could not, of course, place the exact date of the crisis; he knew that it would come some time in the fall, and the length of his delay, the time chosen by him is significant and one of the proofs of our theory.

Meantime, entirely apart from the trust, he gave Mrs. Chater the dividends from month to month as a separate gift, so that she secured the full benefit of his provision without receiving any legal right to future payments which could be inherited by her husband or child. The fact that Judge Hartwell did pay over to Mrs. Chater the dividends from month to month clearly strengthens rather than weakens our contention, for it proves that he was not withholding the dividends for any other person or for any other reason than that he wished her to get the benefit of the provision without having a legal right which could be enforced by Mr. Chater after her death. What other reason could there be for making this peculiar provision that no dividends should be paid until January 1, different from the terms of all the other gifts made at the same time, and then from month to month thereafter giving Mrs. Chater the dividends as they accrued? Looking at the extrinsic circumstances at the time of the trust letter, is it not clear that Judge Hartwell took the natural and in fact the only simple and satisfactory method of achieving his object? In March he was making gifts to several of his daughters, and wished at the same time to make

a provision for Mrs. Chater, but as to her he was faced with the situation which we have described. He was determined to exclude Mr. Chater, and he realized that to accomplish that it was necessary to give Mrs. Chater no vested interest prior to the crisis in the autumn of 1909.

Let us next consider the further postponement of the gift of the principal of the trust fund, the shares of stock themselves. Judge Hartwell thought that if Mrs. Chater survived the birth of the child in the autumn and continued to live for the following few weeks until January 1 he could reasonably count on her living a considerable period longer. He took the arbitrary period of three years as a reasonable time within which Mr. Chater would fully and finally show his quality as a husband and father, and within which also would be determined whether Mrs. Chater, who was 32 years old, would have any more children and would survive their birth, and whether the children would survive the first perilous stages of infancy. Judge Hartwell therefore provided that the dividends should be paid to Mrs. Chater during the three-year period beginning January 1, 1910, and that if at the end of that period she should be living and should have a child the principal of the trust fund should be transferred to her or held in trust for her benefit as she might in writing request, or if she should be living and have no child the trustee should hold the stock giving Mrs. Chater the income for life, and at her death transferring the principal to the then surviving sisters and children. The gift of the principal is postponed for three years and is expressly made contingent on her surviving. The reason for this postponement of the gift of the principal and the making it conditional on the survival of Mrs. Chater is the reason already given—Judge Hartwell's distrust of Mr. Chater and his determination that Mr. Chater should not share either directly or indirectly as guardian of the son in the trust gift.

We submit that there was no possible reason for postponing the payment of the dividends to Mrs. Chater until the

following January 1 if she were surely and unconditionally to have the dividends at that time and for the next three years, and that there was no possible reason for giving Mrs. Chater only the dividends for the three years and postponing the transfer of the stock until the end of that period if she were surely and unconditionally to have the stock at the end of the period. She was not a child too young to be trusted with the income for the first few months or with the stock until several years had passed—she was a woman 32 years of age—nor were the dividends or the stock to be used for any other purpose during the nine months before the following January or during the three-year period. There was no object in delay for delay's sake—no advantage to be gained in the delay simply as delay. The reason for the delay was because Judge Hartwell wished to make the gift conditional and contingent.

There are three classes of cases in which the right to the possession and enjoyment of a gift is postponed. The first class is composed of cases in which the postponement is for a reason disconnected with the personality of the beneficiary or with the nature of the postponed gift, that is, the reason is to let in some other interest. The typical example of this class is the gift of the income of a trust to A for life and a gift of the principal to B on the death of A. In such a case there is no reason for postponement inherent in the personality of B or in the nature of the gift to B. The donor is sure that he wishes B to have the property when A is through with it and makes no condition. The postponement is simply for the purpose of making the gift to A, and it is reasonable and right in the ordinary case to hold that the gift to B becomes vested at once. The second class is composed of cases in which the reason for postponement is personal to the beneficiary. The typical case is a gift to A when A shall attain the age of majority. Here, also, in many cases the reason is not because the grantor is doubtful whether he wishes to make the gift to A; the reason is

simply that it is not wise to give A possession and control until A becomes of age and can be trusted to control the subject-matter of the gift with discretion. In the first class of cases the grantor wishes definitely and surely to give the trust estate to the grantee and simply wishes to postpone the enjoyment for reasons temporary in their nature. In the second class of cases the grantor sometimes has the same intention as the grantor in the first class, but often he is held to intend to make the gift only if the child becomes of age, and the gift to the child is therefore held to be contingent and to lapse on the earlier death of the child. The case at bar falls under a third class of cases. The postponement was not to let in some other interest or until Mrs. Chater became able to control the gift with discretion, but because the grantor did not surely and definitely wish to make the gift to her, he wished to make it only on condition that she survived.

The third significant fact to which we referred is that there was no gift either direct or indirect to any child of Mrs. Chater. The usual and natural provision in such a case is a clause that on the death of the daughter the property shall go to her children, or a clause that if the daughter should die before the time in question the property should go to her children then surviving. Judge Hartwell had in mind the advisability of making such a provision where he could do so and carry out his intention, for he includes it in the terms of the gift over in the latter part of the trust paragraph. He provides that if at the end of the three years Mrs. Chater has no child living the trustee is to hold the stock, paying Mrs. Chater the dividends during her lifetime, and at her death to divide the trust funds equally among her sisters who shall then be living, and if none shall then be living, "*among their children then living.*" But there is absolutely no gift, direct or indirect, to Mrs. Chater's children, either the expected one or those who might be born later, and why? Judge Hartwell's reason is that already stated,

that is, if there were a gift to Mrs. Chater's child or children and the mother should die in their infancy, the subject-matter of the gift would be under the control of Mr. Chater for many years. Judge Hartwell did not hope to control the course of the gift indefinitely, and he probably believed that if Mrs. Chater survived to January 1, 1913, surviving the perils of childbirth of the coming child and possibly others, she would live for a number of years more, probably until the children were well on toward the age of majority. He wished to give the dividends to Mrs. Chater so long as she should live, and wished to give the stock to her if she should survive for a considerable period. Of course if Mrs. Chater should survive until January 1, 1913, and should receive the principal of the trust her children would probably inherit on her subsequent death. Judge Hartwell was perfectly willing to have her children inherit in the future after they had become of age or approaching that time provided their mother lived until then. It was only Mr. Chater, and not the children, whom he wished to exclude, but to exclude Mr. Chater he had to run the risk of excluding the children during their infancy. If Judge Hartwell or the Hartwell family should wish to make any provision for the child they could make it apart from this trust by some method which would give the control to Judge Hartwell and the Hartwell family, and not to Mr. Chater. We say that there is no gift, direct or indirect, to any child of Mrs. Chater. There is only one reference to a child, and that is the provision that if on January 1, 1913, Mrs. Chater shall have no child living she is to receive only a life estate in the income of the stock and not the stock itself. If she has a child she is to receive an absolute interest in the stock, which in the future on her death may or may not go to the child. In other words, the only reference to a child is the provision that the existence of a child on a certain date makes a difference in the nature of the gift made to Mrs. Chater. On January 1, 1913, Mrs. Chater could have received the

stock and transferred it at once away from her children. There were no words of trust for the child to be found in the entire document.

Judge Hartwell may not have thought out his plan as fully and definitely as we have set it forth, but we contend that the trust letter and all the other facts in the case show that he had in mind the general purpose and intention above set forth.

We have emphasized the fact that Judge Hartwell expressed his intention upon one point, to-wit, his desire to keep the trust fund in the family, and that our construction promotes that intention, while appellants' construction overrides and defeats it. Why should this court allow appellants' presumptions and implications and inferences, even taking them at their face value, to override the expressed declaration of the intention of the creator of the trust? Appellants apparently make two answers to this contention. First, they point out that Mr. Chater announces that he consents that any interest which he may have in the stock or dividends may be paid to himself as guardian for the child. This subsequent act however is immaterial so far as the construction of the trust is concerned. While honorable to Mr. Chater, it does not affect the fact that under the appellants' construction the trust fund in part goes out of the family soon after the creation of the trust, and to the very person who was intended to be excluded. Secondly, appellants say that Judge Hartwell's intention was not that the stock should return to him, but that it should go to his family. It seems to us obvious that when Judge Hartwell said "my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family" he had in mind the exclusion of Mr. Chater and not the exclusion of himself. He was politely but firmly excluding Mr. Chater and had no reason to refer to any return of the shares to himself. Under our construction the shares did remain in Judge Hartwell's family because under the result-

ing trust they came back to him, he being still alive, just as if he had been dead they would have returned to his children as his heirs. This gave him the opportunity to pass them on to another member of the family, as he in fact did. Even if the affirmative intention taken in the narrowest sense, that the shares should remain in Judge Hartwell's "family" could not be carried out, that would be no reason for disregarding and overriding the primary negative intention that Mr. Chater should be excluded from any interest, but the result would be that the shares would return to Judge Hartwell himself by a resulting trust. We do not have to prove that Judge Hartwell intended to have the shares return to himself by a resulting trust; we have to prove merely that he did not intend to give Mr. Chater or the child any interest in the event of the death of Mrs. Chater before January 1, 1910; the lack of such an intention leaves the shares undisposed of and they return to Judge Hartwell under general law and not because he so intended. It is immaterial whether Judge Hartwell ever thought of the resulting trust to himself. If he intended that the trust fund should *not* go to Mr. Chater or the child there is no one to take it and a resulting trust arises as a matter of necessity since the trustee cannot hold for himself. Moreover, it is immaterial for the purposes of this case whether the trustee acted rightly in transferring the shares back to Judge Hartwell or whether there was a resulting trust except as that action excluded Mr. Chater and the child. If these two claimants are excluded this case falls, no matter who else had rights.

It seems scarcely necessary to cite authority to the point that "if" imports contingency and makes a gift conditional. Out of the multitude of cases in the books dealing with the meaning and effect of "if" complainants have gathered a few which hold that under exceptional circumstances the word "if" may be construed "when" or may be ignored altogether in order to carry out the plain and sure intent of the testator.

We wish to emphasize one point, and that is that the cases like Furness *vs.* Fox, which construe "if" as "when," on which complainants lay so much stress do not touch the present case. They hold that in a will in which testator says "I give to my son one thousand dollars if he shall arrive at the age of twenty-one" the word "if" can be construed as "when" and the gift held vested, although they always require strong evidence that that is the real intention of the testator. But in our case you cannot merely change "if" to "when" and say "and when she shall then be living," you must eliminate the whole clause to reach complainants' conclusion. The entire clause "if she shall then be living" is purely and simply conditional; no testator would ever use it except for the sole purpose of expressing a condition. On the other hand a testator saying "I give to my son one thousand dollars if he shall arrive at the age of twenty-one" has in mind not merely the condition expressed in "if" but the idea of time, that is, the postponement of possession until the son comes of age, and the remainder of the will easily may show that the second thought was the predominating one and that "if" was carelessly used for "when." Construing one word to mean another as "and" is often construed to mean "or" to carry out the manifest intent, is a vitally different thing from eliminating an entire conditional clause.

Complainants' own quotations concede that the primary and natural meaning and use of "if" is to import a condition, so we will merely cite one or two additional authorities on the point.

> "It is now more than two hundred years since the rule was adopted by English jurists from the civil law, that where a legacy is given to a person 'as,' 'if,' 'when,' or 'provided' he arrives at a certain age, or 'at' that time, and there is no other controlling evidence of intention, the legacy is contingent, and where it is given generally and 'payable' or 'to be paid' at such time, it is vested. * * * Where

the words 'if' or 'provided' the legatee arrive at a certain age are used, the intention to give contingently is clear. But the words 'as,' 'when' and 'at,' may naturally be used, and probably are often used by the draftsman, when the intention of the testator is to give an absolute legacy, but to let it remain in the hands of the executors until the legatee arrives at an age to be entrusted with the control of it;" * * *

Colt *vs.* Hubbard, 33 Conn., 281, 285-286.

"'If' may be a small word, but all know its meaning, and instead of a more formal phrase it is used in common language to express condition or limitation; and in giving it this meaning, I affirm every principle applicable to the construction of wills."

Robnett *vs.* Ashloch, 49 Mo., 171, 175.

The clause "and if she shall then be living" is necessarily a condition precedent, while the "if" clauses in appellants cases are mainly conditions subsequent.

In the cases of conveyances or devises in which there is a gift to A *if* he reaches twenty-one, and a gift over *if* he dies under twenty-one, and the gift to A is held vested, such as *Edwards vs. Hammond*, 1 B. & P. N. R., 324, etc., this is not done by subtracting the element of conditionality from the "if," but by construing the two "ifs" together as a condition subsequent; but where there is no devise over there is no question that the devise is contingent.

We have given up to the arguments based on the terms of this particular trust instrument and the surrounding circumstances the greater part of our brief. We wish, in addition, to state certain helpful rules and to cite authorities thereunder.

Where as in the present case there is no express gift to the beneficiary but the only gift to her is contained in a direction to the trustee to pay over or transfer the subject of the gift to the beneficiary *at some future time*, unless the payment be postponed for the convenience of the estate or to let

in some other interest the gift is contingent and not vested until the time designated for payment arrives and lapses on the death of the beneficiary prior to that time. This applies in the present case both to the gift of stock and to the gift of dividends.

Kountz's Est., 213 Pa. St., 390, 395.
Lewisohn *vs.* Henry, 179 N. Y., 352, 361-362.
Russell *vs.* Girard Trust Co., 171 Fed., 161; 179 Fed., 446.
Andrews *vs.* Rice, 53 Conn., 566, 570.
Morris *vs.* Bolles, 65 Conn., 45, 48-49, 56.
Smith *vs.* Edwards, 88 N. Y., 92, 94-95, 103-104, 108.
Willett *vs.* Rutter, 84 Ky., 317, 320, 321.
Lamb *vs.* Lamb, 8 Watts (Pa.), 184, 186.
Hale *vs.* Hobson, 167 Mass., 397, 399.
Matter of Baer, 147 N. Y., 348, 354.
Reilly *vs.* Bristow, 105 Md., 326, 334, 336.
Rosengarten *vs.* Ashton, 228 Pa. St., 389, 393-394.
Elphinstone on Interpretation of Deeds, Rule 149, p. 391.
2 Williams on Executors, p. 1334 (1232).
Hubert *vs.* Parsons, 2 Ves., Sr., 262; 28 Eng. Rep., 169, 170, bottom.
Hall *vs.* Terry, 1 Atk., 502; 26 Eng. Rep., 318, 319.
See also cases cited under "2" hereunder applying the foregoing rule despite the gift of intermediate income.

The rule that a future and otherwise contingent gift of principal of the subject-matter of the gift tends to vest at once if there is an immediate gift of the income of the said principal is only a rule of construction and yields to the apparent intent of the testator, and in any event does not apply to the present case for five reasons:

1. The rule has its origin in the civil law, and like many

other rules of construction applies only to cases of wills and not to deeds.

Fonnereau *vs.* Fonnereau, 1 Ves., Sr., 119; 27 Eng. Rep., 929.

Hubert *vs.* Parsons, 2 Ves., Sr., 262; 28 Eng. Rep., 169.

Teynham *vs.* Webb, 2 Ves., Sr., 198, 207; 28 Eng. Rep., 133.

Chandos *vs.* Talbot, 2 P. Williams, 613; 24 Eng. Rep., 882 (note).

Bolger *vs.* Mackell, 5 Ves., 509; 31 Eng. Rep., 709.

In one of these English cases a grandmother created by deed a term to commerce after her death for raising money for grandchildren. The suit was to determine when certain interests vested. The court refused to consider cases construing wills, holding—

> "As to the first head of cases relating to legacies by will out of the personal estate, and the rules of the ecclesiastical court in determination of cases on legacies (which this court follows in legatory cases) they are all inapplicable to the present, which has no relation to it; being a case arising not on a will, having nothing testamentary in it, but on a deed, on the terms of a trust, the construction and execution of it in this court."
>
> Teynham *vs.* Webb, 2 Ves., Sr., 198, 207; 28 Eng. Rep., 133.

The Lord Chancellor in construing a trust contained in marriage articles, and deciding whether a gift to a beneficiary child who had died had vested, said:

> "On the other side, the authorities cited, or which can be cited, on wills or testaments concerning personal estates are to be also laid out of the case; because the rules and determinations in this court on portions of legatory portions by will are drawn from the civil law or ecclesiastical court; which cannot take

place in this case arising on articles, a deed at common law; though as there is a trust in it, that must be construed in this court, and cannot be governed as to the rules of the ecclesiastical court, or the rules as to real estates."

Hubert *vs.* Parsons, 2 Ves., Sr., 262; 28 Eng. Rep., 169, 170.

In another case the court, in construing a trust under a marriage settlement and holding that certain gifts did not vest until the performance of the condition named, to wit, marriage with consent, said:

"These portions arise out of lands, and have nothing testamentary in them, so are not subject to the jurisdiction of the ecclesiastical court, nor to be governed by the rules of the civil law, but are subject only to the rules of the common law."

Harvey *vs.* Ashton, 1 Atk., 361; 26 Eng. Rep., 230, 241.

The said rule as to the gift of intermediate interest tending to make vested the gift of the principal has not been applied even to legacies payable out of real estate, since the equity courts have not adopted the doctrine of the civil law applied by the ecclesiastical courts where they have not been compelled so to do.

Gawler *vs.* Standerwick, 2 Cox, 15; 30 Eng. Rep., 11.

Harvey *vs.* Ashton, 1 Atk., 361; 26 Eng. Rep., 230, 241.

2 Williams on Executors, 1352 to 1353 (1252 to 1254).

The foregoing two groups of cases under "1" are valuable for their discussion of the vesting of gifts as well as for the point for which they are cited.

2. Even in wills, if there is no express gift of the principal, but the only clause of gift is found in the direction for payment or transfer of the principal at a future time, the

immediate gift of the income will not vest the future gift of the principal, and the latter will be held conditional. This is especially true in cases where the intermediate income is dividends on stock. Some of the following cases, such as *Batsford vs. Kebbell,* are like the present one, except that the gifts of income are *immediate,* while others are cited simply as approving the doctrine of *Batsford vs. Kebbell.*

Batsford *vs.* Kebbell, 3 Ves., Jr., 363; 30 Eng. Rep., 1055.

Hubert *vs.* Parsons, 2 Ves., Sr., 262; 28 Eng. Rep., 169, 170.

Spencer *vs.* Wilson, L. R., 16 Eq. Cas., 501, 512.

Sansbury *vs.* Read, 12 Ves., 75, 78; 33 Eng. Rep., 30.

Leake *vs.* Robinson, 2 Mer., 363, 384-5; 35 Eng. Rep., 987.

Bolger *vs.* Mackell, 5 Ves., 509; 31 Eng. Rep., 710

Taylor *vs.* Bacon, 8 Sim., 100; 59 Eng. Rep., 40.

American cases:

Pleasonton's Appeal, 99 Pa., 362, 368.

King *vs.* King, 1 W. & S. (Pa.), 205, 207.

High *vs.* Pollock, 114 Md., 580.

Text-books:

1 Roper on Legacies, 581 and 578.

2 Williams on Executors, 1338.

Elphinstone on Interpretation of Deeds, rule 149, pages 391 and 393.

3. The said rule does not apply when the conditional word is "if" as distinguished from "when" or "at."

Ashhurst, J.:

> "The whole question depends on the particular words of this devise. Had the devisor used these words, '*if* Michael Lea shall attain the age of twenty-four,' that would have made it a condition precedent,

and no interest would have vested in him, unless he had attained that age. But here the devisee's estate was to take effect in possession *when* he should attain the age of twenty-four. And this is like the case of a legacy to be paid when the party attains the age of twenty-one that is a vested legacy; but if the legacy be to be paid if the legatee attain the age of twenty-one, it is not vested."

Doe *vs.* Lea, 3 T. R., 41, 43; 100 Eng. Rep., 445, 446.

Accord, Colt *vs.* Hubbard, 33 Conn., 281, syllabus.

In other words, "when" or "at" is *prima facie* equal to "if," and is, therefore, conditional, but the payment of the intermediate income by virtue of this peculiar doctrine prevents "when" or "at" being equivalent to "if" and prevents its being, therefore, conditional. But the payment of income will not make "if" equivalent to "not if" and will not destroy its conditional value.

We know of no case where the gift has been preceded by an "if" in which it has been treated as vested, by reason of interest having been given, and appellants have cited none.

In the case of *Furness vs. Fox,* 1 Cush., 134, where "if" was used, the gift was held vested, not by reason of interest being given, but because the gift and the direction to pay at twenty-one were separate.

4. The said rule does not apply to the present case because there was no present intermediate gift of income, but the gift of income itself was postponed to the future.

5. Finally, what interest is it which could be held to be vested under the said rule? In the cases where the doctrine in question is applied, the income is to be paid to an individual certain, and on reaching majority or other age the principal is to be paid to him; when the time is reached

there is no contingency as to whom the principal shall go; but here there is such contingency. If a child has been born at the end of the three years, the property goes one way; if a child has not been born, then it goes another; and this very fact prevents any vesting before the end of the three years.

One of the most interesting cases is found in England. There was a future gift of principal "in case" the beneficiary should be "then living" and an intermediate gift of income to the same person. It was held that the gift was not vested and that it lapsed on the death of the beneficiary before the time fixed.

Testator, Wm. Cole, bequeathed 1,600 pounds 3 per cent consolidated bank annuities to trustees to pay interest to Isabella Henwood from the time of his decease until three months after decease of testator's wife, Mary Cole; and "in case the said I. H. should be then living and should have attained the age of 21" to pay, transfer, etc., the same to her; but "in case" I. H. should die before the end of the three months after the death of M. C., under the age of 21 and unmarried, then the legacy was to sink into the residue of the estate; and in case I. H. should die before reaching the age of 21, LEAVING LAWFUL ISSUE, then the trustees should transfer, assign, etc., the legacy TO SUCH CHILDREN, etc. I. H. after testator's death married Robert Parsons, attained the age of 21, and then died, being survived by testator's widow, and leaving one child, who now claims the legacy.

Sir Richard Pepper Arden (master of the rolls) in his decision says:

> "I have been very desirous, that I could upon judicial grounds raise an implication of what certainly is not expressed; that either the child of Isabella Parsons, or she herself, took a vested interest in this fund; but upon great consideration I am under the

necessity of determining, that no interest vested either in her or her child. * * *

"Upon the words of this will it is very difficult to know how the circumstance of the legatee's surviving the testator's wife was material to vest the fund in the legatee. But it is expressly so; and then it is not given at all events after the death of his wife; but if the legatee shall be then living, and shall have attained the age of twenty-one. So there could be no vested interest in her till after the death of the testator's wife; but if she should be then living, and should have attained the age of twenty-one, she was to acquire the absolute interest. It is very unfortunate, that the testator has left unprovided for the event, that has happened. She did not survive the wife; but she attained the age of twenty-one, married, and has left a child; and the question is, whether there was any vested interest *whatever* either in her or her child.

"* * * But the case before me is this: For some reason the testator made the surviving his wife three months a condition of Isabella Henwood's taking an absolute vested interest. Why he did so, no one can tell. He directs, that this stock shall sink into the residue in the event of her death before that time, under the age of twenty-one, and unmarried. I wished to consider it vested at the age of twenty-one, whether she survived the wife or not: but so far from that, he again takes up the consideration of her surviving his wife; giving her a power to dispose of it independent of her husband; and then stating the case of her dying under the age of twenty-one, leaving issue. If the case had been put to the testator, he would have said, if she should die, leaving children, without having acquired the absolute interest, it should go to her children; but he gives it to her issue only in the event of her dying under the age of twenty-one, which brings it to the class I have mentioned; a contingency, that has not taken place; upon which only the legacy is directed to vest. If I could have determined in favor of any of the parties before me, it must have been for the representative of Isabella Parsons; but I am under the necessity of declar-

ing, that neither the plaintiff George Parsons nor the defendant Robert Parsons, as administrator of his wife, took any interest in the legacy of 1,600 pounds Bank Annuities; the contingency, upon which the same was given, not having taken place."

Parsons *vs.* Parsons, 5 Ves., Jr., 578; 31 Eng. Rep., 748, 749-751.

See also

Doo *vs.* Brabant, 3 Bro. C. C., 393; 29 Eng. Rep., 605.

Denn *vs.* Bagshaw, 6 T. R., 512; 101 Eng. Rep., 675 (syllabus).

Nahaolelua *vs.* Heen, 20 Haw., 372, 375-6.

In many of the foregoing cases the courts having held that the gifts of principal were contingent and lapsed on the death of the beneficiary, held also either expressly or impliedly that the gifts of income lapsed likewise. We refer to cases where the gift of income was immediate and not postponed to the future, as in the present case, which postponement renders the gift of income contingent independent of the contingency of the gift of the principal.

See for example:

High *vs.* Pollock, 114 Md., 580.

Taylor *vs.* Bacon, 8 Sim., 100; 59 Eng. Rep., 40.

Gawler *vs.* Standerwick, 2 Cox, 15; 30 Eng. Rep., 8.

In many of these cases the fact that the court held that the gift of the intermediate income lapsed like the gift of the principal on the death of the beneficiary before reaching the appointed time must be gathered from the action of the court rather than from any expressed holding. It seems to be assumed as a matter of course that if the gift of principal is contingent on the survival of the beneficiary until the appointed time the creator of the trust could not have intended the income to be paid after the prior death of the beneficiary and until he would have reached the appointed

age or otherwise fulfilled the condition. Thus, in Gawler *vs.* Standerwick, *supra,* the testator "gave * * * 200 pounds apiece to Sarah and Mary * * * to be paid them respectively at their several ages of 21 years * * * *with interest* at 3 pounds per cent per annum *from his death.*" Mary Gawler survived the testator but died before reaching 21. The bill prayed "that the said legacy of 200 pounds given to the said Mary Gawler might be raised and paid immediately to the plaintiff George Gawler, *with interest, from the death of the testator.*" The court held "that the legacy to Mary Gawler was not a vested legacy in her, she having died before the time for payment, and dismissed the bill as to this legacy also."

The gift of the dividends in our case is not made expressly contingent upon the clause "if she shall then be living," but we have presented many arguments why it should be held contingent like the gift of the shares. These arguments were based partly on the general contingency of the gifts both principal and income and partly on special points such as the futurity of the gift of the dividends, that is the otherwise inexplicable postponement of their payment. But isn't the main reason the improbability that Judge Hartwell intended that the income should be paid to Mrs. Chater's estate after her death and after the gift of the principal had lapsed? What reason could he have had for so intending?

Our final point is that where a gift is made upon trusts that fail in whole or in part by lapse on the death of a beneficial donee, if there is no gift over that can take effect, a trust will result to the donor if he is still alive or to his estate if he is dead.

> "There is no equitable principle more firmly established than that, where a voluntary disposition of property by deed or will is made to a person as trustee, and the trust is not declared at all; or is ineffectually declared; or does not extend to the whole interest given to the trustee; or it fails either wholly

or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself or for his heir-at-law or next of kin, according to the nature of the estate."

Hill on Trustees (4th Am. ed.), 179.

See also

1 Perry on Trusts, sec. 160.

3 Pomeroy on Equity Juris., secs. 1032 and 1034.

Elphinstone on Interpretation of Deeds, Rule 115, p. 294.

See also all the cases previously cited in which beneficial interests under trusts were held to be conditional and to have lapsed.

Of course in certain cases there is consideration either valuable or of love and affection flowing from the trustee to the creator of the trust, and in such cases the portion of the estate undisposed of by the beneficial uses stays with the trustee for his own use and benefit instead of resulting back to the donor. That situation did not exist in the present case, and obviously could not have been set up by complainants in support of their claim even if it had existed. This special rule, however, is worthy of notice as it explains certain authorities upon which complainants seem tempted to rely.

We have partially answered complainants' arguments while making our own affirmative argument in the foregoing pages, but we wish to take up specifically their main points.

Like the Supreme Court of Hawaii we fail to comprehend the application to the case at bar of complainants' argument as to resulting trusts and lack of consideration. Undoubtedly, no consideration is needed when a parent makes a gift to a child. We never claimed that there was a resulting trust to Judge Hartwell because of the lack of consideration passing from Mrs. Chater or the child to

Judge Hartwell. There are several entirely distinct kinds of resulting trusts:

> "(1) Where a purchaser pays the purchase money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail, and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially."
>
> Bispham's Principles of Equity, 3d ed., sec. 79.

The cases cited by complainants fall under the first, second, and fourth classes. The resulting trust claimed by us falls under the third class.

> "whenever an owner conveyed land to a feoffee upon some particular use declared in favor of a third person, so much of the use as had not been disposed of resulted back to himself. In other words, if the use declared in favor of the third person did not, for any reason, equal in extent and exhaust the legal estate given to or held by the feoffee, then a use for the residue or surplus of such estate resulted to the feoffor."
>
> 3 Pomeroy Eq. Jur., sec. 981.

This is exactly the case before us. The full legal estate was vested in Mr. Carter, but only an incomplete equitable estate was created in Mrs. Chater and her sisters. The remainder of the equitable estate therefore resulted to Judge Hartwell, and when the equitable estate of Mrs. Chater lapsed the entire equitable fee simple resulted to Judge Hartwell. In other words, the terms of the trust did not cover the situation that arose, and did not contain any gift to anyone after the death of Mrs. Chater, and so the trustee had no authority to transfer the stock or dividends to any-

one, and as he could not hold them for himself a resulting trust arose in favor of the creator of the trust.

Appellants base much of their argument on the claim that a completed gift was made by the transfer of the stock and the issuance of the certificate to "Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater." As the Supreme Court of Hawaii held, following Judge Dickey (printed page 49), "the terms of the trust are to be found in the letter to Carter. That letter is not to be separated from the certificate of stock with which it was enclosed but is to be taken as though its terms were written into the certificate."

Complainants' savings-bank cases in which there is a deposit of money in the name of a trustee for a beneficiary unaccompanied by any declaration of the purposes or terms of the gift do not apply to the present case.

The letter was not a subsequent document, but was delivered simultaneously with the delivery of the certificate. Since Judge Hartwell was putting these shares in trust rather than holding them himself as trustee, he necessarily had a new certificate made out in the name of Mr. Carter as trustee, and this would be true no matter what were the terms of the trust, no matter how conditional or limited the trust might be. So, too, the trust being established for the benefit of Mrs. Chater the certificate naturally read "Alfred W. Carter, Trustee for Charlotte Lee Hartwell Chater." This form would be used no matter how limited or conditional the trust for Mrs. Chater might be. It was particularly necessary to name the beneficiary to avoid confusion, because Carter was holding shares of the same company in trust for other daughters of Judge Hartwell. Mrs. Chater was the main beneficiary in this trust and naturally was named in the certificate, and it would have been utterly foolish to have attempted to state other possible beneficiaries or limitations on the equitable estate of Mrs. Chater in the certificate itself. The proper place to state the terms of the trust was the trust letter. If the trust for Mrs. Chater had been merely for

three years or so expressly conditional that not even appellants could have argued otherwise, would it not have been natural and in fact almost inevitable that Judge Hartwell would have phrased the certificate as he did?

These same considerations form a complete reply to a number of other similar arguments of appellants. Appellants lay stress on the fact that the letter to Chater says the stock is given to Mrs. Chater and that the trust letter refers to the trust as a "trust for Lottie Lee," and that the letter to Mr. Chater states that Judge Hartwell arranged matters so "as to give Lottie Lee 585 shares more" by "now dividing the shares in the Hawaiian Sugar Co." These trust references in the trust letter and in the letter to Mr. Chater prove nothing as to the terms of the gift to Mrs. Chater. As we have just said, in regard to the form of the certificate the phrasing of these references would naturally and almost inevitably be the same whether the trust for Mrs. Chater gave her an absolute or a conditional interest. Judge Hartwell had established a trust for Mrs. Chater, he had given her certain shares of stock; the question is not as to the existence of the trust or the gift but as to the terms thereof. In the trust letter the terms of the trust were set forth and spoke for themselves, and every reference to the trust or gift was naturally qualified by the terms of the gift. The limitations of the gift need not be repeated each time a reference is made to the gift. The references are informal and simple in their phrasing and just as consistent with our construction of the trust as with appellants' construction.

The fact that Mrs. Chater at the request of Judge Hartwell sent to Alfred W. Carter, trustee, receipts for the dividends for the months of April, May and June, 1909, seems to us a fact without significance and entirely consistent with our theory. The stipulated facts show that Carter endorsed and deposited the dividend warrants for the said months of April, May and June in the bank to the credit of Judge Hartwell and that Judge Hartwell subsequently paid the

amounts of the dividends over to Mrs. Chater through Charles Brewer & Company at Boston. The deposit of these dividend warrants by Carter to the credit of Judge Hartwell was evidently under instructions from Judge Hartwell outside of the trust instrument, as is shown by Judge Hartwell's letter to Mr. Chater in which Judge Hartwell informs Mr. Chater that he has instructed Brewer & Company to pay Mrs. Chater the amount of the said dividends. The payment of the July and August dividends by Carter direct to Mrs. Chater undoubtedly was under further instructions from Judge Hartwell also outside and apart from the trust instrument, and this shows conclusively that Judge Hartwell retained the control of these dividends up to January 1, 1910, in his own hands. As we have already stated, he wished Mrs. Chater to receive these dividends, but he did not wish her to receive any vested right which would be inherited by her husband in case of her death in childbirth in the fall. He therefore postponed her right to receive the dividends under the trust instrument until January 1, 1910, and apart from the trust made arrangements for the payment of the dividends to her during the summer and fall. These arrangements having been made it was natural that he should also arrange to have Mrs. Chater send receipts to Carter for the dividends. Carter holding the stock was paying the dividends and Mrs. Chater was receiving them, and it was proper and in accordance with good business practice to have Mrs. Chater send receipts to Carter. If all went well in the future and Mrs. Chater should survive the crisis in the fall she would receive these dividends for a number of years and it was wise to have Carter begin his collection of receipts from Mrs. Chater from the time he first received the certificate of stock and became responsible first to Judge Hartwell and then to Mrs. Chater for the payment of dividends. The certificate was in the name of Alfred W. Carter, trustee, and the trust was instituted for the benefit of Mrs. Chater, and the receipts, like the certificate and also Judge

Hartwell's letter, referred to Alfred W. Carter as trustee. If the postponement of the payment of dividends to Mrs. Chater under the trust until January 1, 1910, had been an oversight Judge Hartwell would have noticed it in copying out that provision of the trust in his letter to Chater and would have explained it. So, too, he would have called it to the attention of Carter and instructed Carter to send the dividends to Mrs. Chater instead of instructing him to deposit them in the bank to his own, Judge Hartwell's, credit. The letter to Chater written two days after the trust instrument shows that Judge Hartwell had in mind then the fact that the dividends for the summer and fall of 1909 were not payable to Mrs. Chater under the trust, and was making arrangements for the payment of dividends outside of the trust in accordance with our theory. All this shows that the postponement in question was not an oversight.

On the assumption that the execution and delivery of the certificate constituted an absolute gift on which trusts were thereafter grafted by the trust letter, appellants have built up an argument, mainly supported by English cases, that if any portion of the trusts fail, the resulting trust is to the donee—not to the donor. Assuming that there is an original main complete gift and that "trusts are engrafted upon it," to use the apt and expressive phrase of appellants, their argument is sound. If a man gives property to his son and then provides that the son shall use a portion of the property for the education of his children and the son has no children, the courts may well hold that the son takes the entire interest free from the engrafted trust provision which cannot be carried out rather than that there is a resulting trust back to the original donor. So, if a man gives property to his son and adds some future gift of an interest which is held illegal as contrary to the rule against perpetuities, for instance, courts in many instances upon holding the future gift illegal free the original main gift to the son from the limitation and make it absolute. In such cases there is no

reason apparent for not making the first gift absolute except the desire to make the second gift, and when the second gift fails the first is left in force and unlimited. In this case there was no original absolute gift with trusts engrafted thereon or gifts of future interests which proved to be illegal or which lapsed; the original gift to Mrs. Chater itself was limited and conditional for reasons inherent in that gift and not simply because of a desire to make further gifts. Moreover, the gift consisted merely in directions to pay and transfer. Complainants are attempting to make a conditional gift unconditional—to do away arbitrarily with the conditions and limitations and make the gift absolute against the expressed intention of the donor. This would be equivalent in the English cases to the courts holding the subsequent gifts illegal and yet giving the gifts to the subsequent donees, instead of giving the entire interest to the primary donee as they do.

In another class of cases cited by appellants a man gives property to his child and uses terms that ordinarily would carry only a life interest or that do not cover some particular contingency, the donor not limiting or making conditional the gift but simply failing to use broad enough terms. In such cases the courts well may and often do enlarge the gift instead of creating a resulting trust. In doing this they are not running *contra* to any intention of the testator, but simply filling out the expression of intention and curing an oversight. They do even this, however, with great caution and only in clear cases and to a limited extent. Moreover, all or practically all these cases are cases of wills and not deeds, and, as Judge Dickey and the Supreme Court both held, courts go much further in such direction in construing wills than in construing deeds. This class of cases is clearly to be distinguished from a case such as the present, in which the gift is conditional and limited for a reason which is directly expressed as well as clearly implied.

A large part of appellants' brief is devoted to the sec-

ondary claim that "there is an implied gift to Charles Hartwell Chater on the death of his mother before January 1, 1913." This claim is based on the clause "unless at the end of three years she shall have no child living." In the first place, this claim can apply only to the gift of the shares on January 1, 1913, and not to the gift of the dividends for the three preceding years. The clause in question, "unless at the end of three years she shall have no child living," is a part of the provisions of the trust dealing with the gift of the shares and has nothing to do with the gift of the dividends. Moreover, even under the claim of the appellants' brief, this implied gift to the child is contingent on his surviving on January 1, 1913, and therefore no dividends prior to that time could be paid over to him even if the claim of this implied gift were well founded.

We call the attention of the court to the further fact that all the cases cited by appellants under this heading are cases of wills rather than deeds. This is true of almost every case cited by appellants except those cited in support of certain minor points. Some of the rules of construction applied to wills are not applied in the construction of deeds and others are applied with much less force. It is therefore dangerous to use decisions in testamentary cases in the construction of a deed.

We have claimed throughout that the intention of the creator of the trust should govern in construing deeds as well as wills. That does not mean, however, that a specific artificial rule like the rule of implied gifts established by the courts in testamentary cases should be applied to deeds *inter vivos*.

The Supreme Court of Hawaii (printed page 51) quoted authorities showing that it was doubtful whether the rule in question applied to deeds, and that if it did it would be applied less readily than in will cases.

The presumption against intestacy which needs to be supported by such artificial aid and rules of forced construction

is not matched by a presumption of equal force in a trust created *inter vivos*. A man making a will is giving his last final instructions as to what shall happen after he is dead and can exercise no further control. There is a very strong presumption that he intends to cover every contingency and give interests amounting to a complete estate. A man creating a trust to be in operation while he is yet alive is not so careful or so likely to intend to give complete interests. If the trust fails and the property goes back to him he can dispose of it just as Judge Hartwell did in the case before us.

See Bispham's Principles of Equity, sec. 87.

Moreover, even in the case of wills a gift will be implied only when that is the only intention which can reasonably be imputed to the testator.

> "In applying this principle, the Supreme Judicial Court of Massachusetts, in the case of *Metcalf vs. Framingham Parish*, 128 Mass., 370, 374, speaking by Gray, C. J., said: 'The decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture; *but if a reading of the whole will produces a conviction that the testator must necessarily have intended* an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has in the whole will sufficiently declared. *Ferson vs. Dodge*, 23 Pick., 287; *Towns vs. Wentworth*, 11 Moore P. C., 526; *Abbott vs. Middleton*, 7 H. L. Cas., 68; *Greenwood vs. Greenwood*, L. R., 5 Ch. Div., 954.'"
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> *Robinson vs. Portland Female Orphans' Asylum*, 123 U. S., 702.

Apart, however, from these considerations, we submit that the doctrine of implied gifts cannot be applied to the case at

bar in favor of the child. It is expressly and necessarily based by appellants on the clause "unless at the end of three years she shall have no child living," the claim being that this implies that in the alternative of her having a child living the child shall take. This clause, however, is governed by the previous clause, "if she shall then be living," and depends upon that contingency, so that the alternative would be the case of her surviving and having a child surviving also, in which case she would take by express provision and not the child. The clause "unless at the end of the three years she shall have no child living" clearly is limited to the case of her being still surviving, because Judge Hartwell goes on to say, "*in which case* the trustee is to hold the stock paying her the dividends *during her lifetime* * * * and at her death to divide the trust funds." The phrasing of the said clause also indicates that it applies only in the event of Mrs. Chater's being alive; it reads, "unless at the end of the three years *she shall have* no child living," whereas if it applied whether Mrs. Chater were living or not it would read "unless at the end of the three years *there shall be* no child living." We have elsewhere shown many other reasons why all the clauses relating to the shares, including the one in question, are dependent on the primary clause "if she shall then be living." The two alternatives are both governed by the primary contingency if the mother shall then be living, whereas complainants' construction means that the one alternative of her having no child living is dependent upon her own surviving, while the other alternative of her having a child living with the result of the child taking is dependent upon her not being alive herself.

A provision following the word *"unless"* is carved out, as it were, of the preceding provision and cannot be broader in its scope. When the creator of a trust says, "If my daughter is alive on a certain date give her the stock *unless* she has no child living," the "unless" clause must mean "unless she being living has no child living." It would be absurd to

say, "If my daughter is alive on a certain date give her the stock *unless* she is not alive and has no child living." The "unless" clause never covers any directly contradictory contingency.

The rule as to implied gifts is mainly based on the presumption that the father or grandfather intends to make complete gifts to his children or grandchildren. In the case before us this presumption is rebutted by the facts.

> "It appears here that the birth of a child to the primary object of his bounty was anticipated by the donor and evidently was in his mind when he penned the terms of the trust. The language of the trust instrument must be read with a view to the circumstances under which it was written. The letter was written with the fact in mind that a child was actually in gestation with the probability that in due course it would come into being. Yet, although contingent provision was made in the same instrument for the children of other daughters, there was no provision for any child of Mrs. Chater. The natural inference to be drawn is that provision for the expected child was intentionally omitted. Under these circumstances the court is not permitted to find that there was a gift by implication."
>
> Decision of Supreme Court of Hawaii (printed pages 51-2).

Moreover, any argument as to Judge Hartwell's grandfatherly affection for the child and the presumption based on that that he intended to give him the shares of stock on the death of the mother, falls rather flat when we consider Judge Hartwell's subsequent actions. The statement of facts show that Judge Hartwell after the death of Mrs. Chater received the dividends himself for several months and then made a demand on the trustee for the return of the shares, and after receiving the shares gave them to another daughter, who enjoyed the income thereafter and still holds them. As Judge Dickey says (printed page 24):

> "No change of circumstances is shown which might alter the sentiments towards the Chaters. If he in making the trust intended that on the death of Lottie Lee before 1913 leaving a child, the stock should be paid to her estate or to her son, he had the power in November to and naturally would effectuate that intention by transferring the estate to the administrator of the estate or to the boy."

While subsequent acts of one party to a contract as a general rule cannot vary the rights of the parties and cannot modify the contract or transaction, we submit that when the issue is the intention of one of the parties the subsequent acts of that party in evidence can be considered as tending to throw light on his intention and to rebut presumptions.

Appellants seem to agree with us on this point, as they moved in the Supreme Court of Hawaii for the admission of the letter written by Judge Hartwell to Mr. Chater two days after the creation of the trust as "newly discovered evidence material to the just decision" of the case (printed page 27). This letter was not written to the trustee, or brought to his attention so far as appears, and does not purport to amend or supplement the provisions of the trust.

Clearly it cannot be taken as part of the trust document; its terms cannot be taken by themselves, but at the most merely help in interpreting the trust letter.

We contend that the decision of the Supreme Court of Hawaii dismissing appellants' bill should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

Dated Washington, D. C., April 16, 1915.

CHATER *v.* CARTER, EXECUTOR OF HARTWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 544. Argued April 30, May 3, 1915.—Decided June 21, 1915.

A trust of certificates of stock to cause dividends thereon to be paid to a designated party as beneficiary for a specified period and on the expiration thereof to transfer the stock itself to the beneficiary if living unless childless in which event the trustee was to hold the stock and pay the dividends to the beneficiary during life and on the death of the beneficiary to distribute to designated parties, *held*, in this case, to have failed in case of the death of the beneficiary within the period specified both as to the stock and the dividends and that the trustee was bound to return the stock to the donor and that it did not pass to the heirs or personal representative of the beneficiary.

In construing a declaration of trust, in this case in form of a letter and phrased in simple language, the guiding principle is to seek the intention of the maker, as expressed in the instrument; and the court is not called upon to strain the meaning of words, as is sometimes done in the case of wills so as to avoid intestacy.

Where the death of the beneficiary defeats the trust and leaves the trustee without directions or authority to transfer the fund to any beneficiary, as he is *functus officio* and cannot in equity retain the fund for himself, there is a resulting trust for the donor to whom he must redeliver the fund.

22 Hawaii, 34, affirmed.

THIS is an appeal from a decree of the Supreme Court of Hawaii (22 Hawaii, 34), affirming a decree of the Circuit Court of the same Territory which dismissed a bill in equity brought by Charles Hartwell Chater, a minor, by his father, Charles H. Chater, as next friend and guardian, in which the father joined as a complainant in his own right and as Administrator of the estate of his deceased wife, Charlotte Lee Hartwell Chater; the defendants being Alfred W. Carter, as trustee of a trust

created by the late Alfred S. Hartwell, deceased, in his lifetime, Alfred W. Carter as the executor of the will of Alfred S. Hartwell, deceased, Mabel R. Hartwell, and the Hawaiian Sugar Company, a corporation organized and existing under the laws of the Territory of Hawaii. The object of the bill was to require an accounting and transfer of 585 shares of the capital stock of the Sugar Company and the dividends declared thereon since August, 1909, including 292½ shares of new stock issued as a dividend. The case was heard upon an agreed statement of facts in substance as follows:

"Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the Circuit Court of the First Circuit, Territory of Hawaii, on the 15th day of October, 1912. The defendant Alfred W. Carter was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the Supreme Court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the Supreme Court of Hawaii. He was the father of seven daughters all of whom except Charlotte Lee Hartwell Chater now survive, to-wit, the five named in the instrument dated March 27, 1909, attached to the complaint herein marked 'Exhibit A,' namely: Charlotte Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell and Juliette Hartwell, ('Lottie Lee,' named in said instrument Exhibit 'A,' being Charlotte Lee Hartwell Chater, and 'Mabel,' being Mabel R. Hartwell), and also Madeline Hartwell Judd and Edith Hartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to-wit, on July 15, 1908, and was then on March 27, 1909,

of the age of 32 years and without children. The daughters named in said instrument, other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

"Charlotte Lee Hartwell Chater died in Natick, in the County of Middlesex, Commonwealth of Massachusetts, where she had been residing with her husband, Charles H. Chater, on the 3rd day of September, 1909, in childbirth, intestate, leaving the complainants, her husband, Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909; thereafterwards, on the 15th day of November, 1909, the Probate Court of the County of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hartwell Chater, and issued letters to him, and he duly qualified as such and is now acting; and said Probate Court, on the 17th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

"The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the Territory of Hawaii, having its usual place of business in Honolulu, in said Territory.

"Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater, 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Al-

fred W. Carter, Trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

"Honolulu, T. H., March 27, 1909.

"Mr. Alfred W. Carter, City.

"DEAR ALFRED: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

"The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her life-time, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as

Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

"I also enclose for you to retain for Mabel Certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

"I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

"I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

"Very truly,
"ALFRED S. HARTWELL.

"This declaration of trust is the aforesaid 'Exhibit A.'

"At the same time, similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

"On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

"Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

"HONOLULU, T. H., March 29, 1909,
"Mr. Charles H. Chater, South Natick, Mass.

"MY DEAR MR. CHATER: I have not been a good Correspondent for I have had many cares and responsibilities resting upon me.

"I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar Stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr Chater will observe, that as to these additional 585 shares they shall remain in my family.'

"I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15, and

June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

"I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

"It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

"I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead here to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

"I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new Cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in

which I should like to stay, it now seems to me, when I am east in the summers.

"You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

"Faithfully yours,

"(S'g'd) ALFRED S. HARTWELL.

"Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

'BOSTON, MASS., April 15, 1909.

'Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares of Hawaiian Sugar Co. stock, held by him as my trustee.

'(Signed) CHARLOTTE L. H. CHATER.'

"Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

"Alfred W. Carter endorsed and delivered the dividend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

"After the death of said Charlotte Lee Hartwell Chater the defendant Alfred W. Carter delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, endorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November 29, 1909, issued to said

Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, Trustee for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of that trust but receiving the same without consideration and as a gift from her father and not on any secret trust or understanding.

"It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on demand of said Alfred S. Hartwell and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

"On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent., paid the said Mabel R. Hartwell $20 for a fractional one-half share, and on July 2nd issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1552 shares in Mabel R. Hartwell's name, which 1552 shares are still standing in her name."

It was further stipulated that cash dividends were paid as they accrued to A. W. Carter, Trustee, from September, 1909, to January, 1910, to Alfred S. Hartwell from that date until May, 1910, and thereafter until the commence-

ment of the suit to Mabel R. Hartwell, subsequent dividends having been retained by the company. The market value of the stock is likewise stated, showing that the sum in controversy exceeds the amount requisite for an appeal to this court. The following also appears:

"The estate of said Charlotte Lee Hartwell Chater is not indebted to any one; the known heirs are the complainants, Charles H. Chater and Charles Hartwell Chater; and the said Charles H. Chater consents that any interest which he may have in said stock or said dividends may be accounted for and paid to himself as guardian for said Charles Hartwell Chater."

Mr. David L. Withington, with whom *Mr. Joseph P. Bell* was on the brief, for appellants:

A present equitable title to the stock vested in Mrs. Chater, which has never been divested.

An equitable title passed to Mrs. Chater, subject to the trust.

The trust having expired by its own limitation, without divesting the beneficiary of her title, the legal title followed the equitable title to the beneficiary or her estate.

There is no resulting trust to the donor in the case of a gift to a child.

There was a vested future interest to Mrs. Chater, which did not lapse on her death. General rules of construction favor a vested gift in this case. The law favors a vested, rather than a contingent, interest. A gift of intervening income is evidence of a vested gift of the principal. Failure of donor to provide a gift over is evidence that the gift was not intended to be contingent. The fact that like gifts made at the same time were treated by donor as vested is evidence that Chater gift was vested. Language in a trust is to be construed most strongly against the donor, the party using same. The language of the transaction itself shows a vested gift. There is an implied gift to

Charles Hartwell Chater on the death of his mother before January 1, 1913. The exact language as to these dividends is one of an absolute vested gift. The general rules of construction favor a vested gift as to the dividends. The law favors a vested, rather than a contingent, gift. Where language sets out a complete gift the court will not override or cut it down unless the language contra is clear and unequivocal. The construction of the particular clause shows a vested gift. An annuity so passes. Gifts of income of real estate for years pass to the estate of the beneficiary. An interest in life insurance policy issued for the benefit of a person other than the insured, passes to the beneficiary's estate.

The defendants Mabel R. Hartwell, Alfred W. Carter, and Hawaiian Sugar Company are liable to the complainants.

Numerous authorities of this and other courts support these contentions.

Mr. Robbins B. Anderson for appellees.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

We have here a trust declared in writing by the late Judge Hartwell, of Hawaii, a man of ample means and of long experience as a practicing lawyer and judge, the father of seven daughters, four married, three unmarried, of whom five were named and in some way provided for in the trust instrument. The subject of the controversy is 585 shares of the stock of the Hawaiian Sugar Company, for which a certificate accompanied the trust instrument, the certificate being in the name of "Alfred W. Carter as Trustee for Charlotte Lee Hartwell Chater;" separate certificates being at the same time issued and delivered to Mr. Carter as trustee for Juliette Hartwell and Dorothy

Hartwell, respectively, and a certificate for 250 shares in the name of Charlotte Lee Hartwell Chater being also delivered to him.

The date of the trust instrument is March 27, 1909. The particular clause out of which the controversy arises reads as follows:

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her life-time, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family."

The substance of this was copied into Judge Hartwell's explanatory letter to his son-in-law, Mr. Chater, dated two days after the trust instrument, and which all parties have treated as throwing a legitimate light upon the meaning of that instrument.

The trust for Mrs. Chater was evidently created in view of her approaching maternity, an event that occurred about four months before "January 1st, next," and was followed by her death on the 3d of September, 1909, leaving a son, who still survives. The question is, Who is entitled to the shares of stock and to the dividends accruing after January 1, 1910?

Appellants contend (1) that upon the establishment of the trust accompanied by the delivery to the trustee of the stock certificate naming her as beneficiary, an equitable title passed to Mrs. Chater subject only to

the trust, and that when the trust expired by its own limitations the legal title followed the equitable title and became vested in Mrs. Chater's estate; or (2) that there was a vested future interest in Mrs. Chater, which did not lapse upon her death; or (3) that even if the gift to Mrs. Chater was not vested there was an implied gift to her son upon her death prior to January 1, 1913. And, in any event, it is contended (4) that the gift of the dividends to Mrs. Chater for the period of three years from and after January 1, 1910, was absolute and passed to her estate.

Appellees contend, on the other hand, that by the terms and true meaning of the trust instrument there was no present gift to the beneficiary, expressed or implied, creating any interest, legal or equitable, but only a direction to the trustee to pay or transfer the subject of the trust to the beneficiary at a future time upon express condition that she were then living; that her death before the first of January, 1910, defeated the trust as to the dividends as well as the principal; and that since the trustee was thus left without directions or authority to transfer the stock or the dividends to any beneficiary, and could not hold them for himself, a resulting trust arose in favor of the donor.

The declaration of trust is in the form of a letter, and is clearly and simply phrased, without employment of technical terms. In seeking its true construction, little assistance can be had from technical rules. The guiding principle must be, to seek the intention of the settlor. We mean, of course, his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test.

We cannot yield to the argument that because the stock certificate was caused to be issued in the name of Mr. Carter as trustee for Mrs. Chater there was a present transfer of the equitable title to her, subject only to the terms of the declaration. The mention of her name in

the certificate had its proper purpose in earmarking the stock and identifying the trust to which it pertained; but the terms of that trust must be found in the accompanying letter.

In construing it, we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed. Judge Hartwell evidently contemplated that Mrs. Chater was to become a mother, and he makes the ultimate disposition of the stock (if she survives) turn upon the question whether she shall have a child or children living at the end of the designated period of three years from January 1, 1910; yet he makes no provision for the child in the event of her death in the meantime. And even the payment of dividends to Mrs. Chater is postponed until January 1, 1910. We are left without explanation of this, unless it be attributable to a purpose that the inception of the trust should depend upon her surviving the perils of childbirth. We must therefore reject the theory that there was a vested future interest in Mrs. Chater or an implied gift to her child in the event of her death prior to January 1, 1913. As to the dividends, the gift of these must likewise be treated as contingent upon her surviving to receive them; for it was not even a gift in terms, but only a direction to pay them to her during the three years from January 1, 1910.

The main purpose, as expressed, was to hold the principal fund until January 1, 1913, when, if Mrs. Chater were living and had a living child or children, she should decide for herself whether to take the fund into her own hands or allow the trustee to continue to hold it for her benefit; but if she had no child living, the trustee was to hold the fund, giving her the income only, and at her death dividing the fund among her sisters, etc.,—"my object being, as Mr. Chater will observe, that as to these additional shares they shall remain in my family."

Mrs. Chater was the chief object of the bounty. What she was to receive, and when she was to receive it, were stated in plain terms. Beyond this, we think there are none of the implications that are deemed to arise in cases of wills.

But the event that happened—her death before January 1, 1910—although evidently in contemplation as a possible event, was not provided for. What then happens? The trust has failed; the trustee is *functus officio;* he cannot in equity retain the fund for himself; he must simply redeliver it to him from whom it came. In other words, there is a resulting trust for the donor.

The entire matter is so fully and satisfactorily discussed in the opinion of the Supreme Court of Hawaii that we need not further elaborate it.

Decree affirmed.